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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1930

## No. 342

SOUTHERN RAILWAY COMPANY, PETITIONER,

*vs.*

JACK W. HUSSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 9, 1930.

CERTIORARI GRANTED OCTOBER 20, 1930

(35,264)

(35,264)

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[fol. 1] Citation, in usual form, showing service on Jesse W. Barrett et al., filed July 26, 1929, omitted in printing.

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[fol. 2]

**IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI, DIV. 2**

No. 8124

JACK W. HUSSEY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

NOTICE OF APPEAL—Filed July 26, 1929

To the above-named plaintiff, Jack W. Hussey, or Mark D. Eagleton, or Jesse W. Barrett, Attorneys of Record:

You are hereby notified that the defendant appeals from the judgment entered in the above entitled cause in favor of the plaintiff and against the defendant, the Southern Railway Company, entered on the 13th day of November, 1928.

Southern Railway Company, by Sam B. McPheeters, Charles A. Houts, Its Attorneys.

Received copy of above notice this — day of July, 1929. Jesse W. Barrett, Ellison A. Poulton, and Mark D. Eagleton, Attorneys for Plaintiff, Jack W. Hussey.

[File endorsement omitted.]

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IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—February 8, 1928

Now on this day come defendants in the above entitled cause and file herein a transcript of the record on removal

of said cause from the Circuit Court, City of St. Louis, Missouri.

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[Caption omitted]

[fol. 3] IN CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI, FEBRUARY TERM, 1928, DIV. —
No. —

JACK W. HUSSEY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, and CLEVELAND-CINCINNATI-CHICAGO and ST. LOUIS Railways Company, a Corporation, Defendants

PETITION—Filed Jan. 19, 1928

Plaintiff for his cause of action states that plaintiff is a resident of the City of St. Louis and State of Missouri, and that defendant, Southern Railway Company is a corporation duly organized and existing under and by virtue of law and engaged in business as a common carrier of passengers for hire and doing business in the State of Missouri with an office and place of business in the City of St. Louis, Missouri and that defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company is a corporation duly organized and existing under and by virtue of law and engaged in business as a common carrier of passengers for hire and doing business in the State of Missouri with an office and place of business in the City of St. Louis, Missouri.

Plaintiff further states that on or about September 2, 1927 in the City of Louisville, State of Kentucky, plaintiff purchased a ticket to St. Louis, Missouri, from defendant Southern Railway Company, and entered and was received as a passenger on a train of said defendant, Southern Railway Company at or about 9:50 P. M. on the day and year aforesaid in said City of Louisville, Kentucky, aforesaid, for the purpose of being carried and transported as such passenger to St. Louis, and that defendant, Southern Railway Company thereby promised and agreed, and it was the duty of the defendant, Southern Railway Company to carry and transport the plaintiff well and safely to his destination.

That said defendant, Southern Railway Company carried [fol. 4] him to a point at or about six miles east of the town of Princeton in the State of Indiana, and that at or about 1:30 A. M. September 3, 1927, and while plaintiff was sleeping in his berth on said car of said defendant, Southern Railway Company, and while the plaintiff was a passenger, and without fault, negligence or want of care on his part, said defendant, Southern Railway Company, its agents and servants negligently, carelessly and recklessly caused and permitted said train aforesaid to collide with terrific force and violence with, upon and against a train of defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company, and that said collision directly and proximately hurled plaintiff forward with great violence, throwing his head and back against the front steel partition of the berth and against the steel window frame of the berth in which plaintiff was riding, causing severe and grave injuries, particularly to his head and spine which resulted in extreme pain and suffering and in permanent and lasting injury; the muscles, tendons, tissues, nerves, ligaments and membranes of the right side of plaintiff's neck were sprained, torn and contused; his spine was severely injured in the region of the fourth and fifth lumbar vertabræ, causing a derangement and impairment of his nervous system. He suffered a severe injury to the sacro-iliac joint, together with such a bruising and laceration of the muscles, tendons, tissues, nerves, ligaments and membranes of the back and surrounding the sacro-iliac joint as to produce considerable swelling and inflammation thereof, and a crashing blow upon the head of such force that the brain suffered severe concussion and contusion which resulted in the severe mental and physical injuries, both temporarily and permanently. As a result of the accident and the injuries received therein, he was confined to his [bead] for a whole month with fever, delirium and in pain and suffering, accompanied by abdominal pains and a nausea which produced frequent vomiting. As a direct result of said accident, plaintiff states that he is still occasioned intense physical pain and suffering and mental disability. He still has recurring headaches which resist medical treatment. He is mentally unable to concentrate upon the duties of his employment or any other subject. He suffers insomnia which can be relieved only by the use of drugs and he is contsantly afflicted with a nervous

instability which unfits him for work or any useful employment of his time. He has suffered loss of weight as a direct result of the injuries, and an impairment of his eyesight with resulting conjunctives. Plaintiff says that he has suffered as a direct result of said accident a permanent de-
[fol. 5] rangement of the nervous system and that by reason of said injury he is always and always will be partially disabled from the full performance of the duties of his employment and will suffer great pain of body and mind and nervous and other mental and physical ill effects and that he will have further attacks of severe pain and of great danger to his mind and body; that he has reasonably incurred bills for medical, surgical and optical attention and medicines in the necessary treatment of said injuries, and will in the future be compelled to expend large amounts for the necessary treatment of said injuries aforesaid and by reason of said injuries plaintiff has lost and will lose much time from his employment.

Plaintiff further states that on the day and year aforesaid and at the time and place aforesaid, defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company had a railroad track intersecting and branching off from the track of defendant, Southern Railway Company, and that at or before 1:30 A. M. on the day and year aforesaid and at the time and place aforesaid, defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company, its agents and servants, negligently, carelessly and recklessly caused and permitted a switch at the place aforesaid and connecting said tracks of said defendants to remain open and negligently, carelessly and recklessly caused and permitted a train of said defendant, Cleveland-Cincinnati-Chicago and St. Louis Railway Company to stand on the said track of said defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company and a short distance from the track of said defendant, Southern Railway Company, and that said defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company, its agents and servants, knew, or by the exercise of reasonable care could have known, that said open switch aforesaid and said standing train aforesaid endangered the life and limbs of passengers on said train of said defendant, Southern Railway Company, aforesaid, and of this plaintiff in particular, which said Cleveland-Cincinnati-Chicago and St. Louis Louis Railways Com-

pany, its agents and servants, knew, or by the exercise of reasonable care could have known, was due to arrive at said switch at said time and place aforesaid, but that said defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company, its agents and servants, negligently, carelessly and recklessly allowed and permitted said switch to remain open and said train remain in said position aforesaid; that as a direct and proximate result of said negligence, carelessness and recklessness aforesaid, said train of [fol. 6] said defendant, Southern Railway Company, aforesaid, was directly and proximately caused to turn from the tracks of said defendant, Southern Railway Company, aforesaid on the said track of defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company, aforesaid and to collide with terrific force and violence with, upon and against said train of said defendant, Cleveland-Cincinnati-Chicago and St. Louis Railways Company, aforesaid and resulting in the injuries to plaintiff all as above set out and described.

Plaintiff further states that by reason of the aforesaid carelessness, recklessness, negligence and omissions of defendant, Southern Railway Company, and Cleveland-Cincinnati-Chicago and St. Louis Railways Company, resulting in the injuries aforesaid, the plaintiff has been damaged in the sum of Seventy-Five Thousand ($75,000.00) Dollars, for which sum, together with his costs plaintiff prays judgment against defendants, Southern Railway Company and Cleveland-Cincinnati-Chicago and St. Louis Railways Company.

Jesse W. Barrett, Ellison A. Poulton, Attorneys for Plaintiff.

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IN CIRCUIT COURT OF CITY OF ST. LOUIS

SUMMONS AND SHERIFF'S RETURN

STATE OF MISSOURI,
City of St. Louis, ss:

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summon:—Southern Railway Company, a corporation, and Cleveland-Cincinnati-Chicago and St. Louis Railways Company, a corporation, to appear before the Judges of our Circuit Court, on the first day of the

next term thereof, to be held in the City of St. Louis, at the Court House in said City, on the first Monday of February next, then and there to answer the complaint of Jack W. Hussey, as set forth in the annexed petition; and have you then and there this writ:

Witness John Schmoll, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St. Louis, this 19th day of January in the year of our Lord, nineteen and twenty-eight.

John Schmoll, Clerk. (Seal.)

[fol. 7] Served this writ in the City of St. Louis, Missouri, on the within named defendant the Southern Ry. Co. (a corporation), this 20th day of January, 1928, by delivering a copy of the writ and petition as furnished by the Clerk to A. Kolin Supt. of the said defendant corporation, he being in said defendants usual business office and in charge thereof.

The President or other Chief Officer of said Defendant could not be found in the City of St. Louis at the time of service.

Anton Schuler, Sheriff, by Gus Reuter, Deputy.

I further served this writ in the City of St. Louis, Missouri, on within named defendant the C. C. C. & St. L. Ry. Co. (a Corporation), this 20th day of Jan. 1928, by delivering a copy of the writ as furnished by the Clerk to A. Schaefer C, Clerk of the said defendant Corporation, he being in said defendants usual business office and in charge thereof.

The President or other Chief Officer of said Defendant could not be found in the City of St. Louis, at the time of service.

Anton Schuler, Sheriff, by Ed. Romacker, Deputy.

Fee $2.00.

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IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

ORDER REMOVING CAUSE TO FEDERAL COURT—February 6, 1928

Now at this day come the defendants by their attorneys and file and submit to the Court a notice and verified peti-

tion praying for an order removing this cause to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; and also present to the Court their bond, conditioned according to law in the penal sum of Five Hundred ($500.00) Dollars, with National Surety Company as surety; and the Court, having seen and examined said petition and bond, and being satisfied that written notice of said petition and bond for removal has been given the adverse party to this suit prior to filing the same, doth accept said petition and bond and doth [fol. 8] order that said bond be approved and filed, which is done, that the prayer of said petition be granted and that the Clerk of this Court forthwith certify for entering in the District Court of the United States for the Eastern Division of he Eastern Judicial District of Missouri, a copy of the record in the above entitled cause, as fully as the same remains on file and of record in this Court; that no further proceedings be had in this suit in this Court.

---

IN CIRCUIT COURT OF CITY OF ST. LOUIS

NOTICE OF REMOVAL

To Jack W. Hussey or Jesse W. Barrett and Ellison S. Poulton, his attorneys:

Please Take Notice that the defendants will on Monday, February 6th, at Ten o'clock A. M., or as soon thereafter as counsel can be heard, move the court for an order removing said cause to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in accordance with the petition and bond of defendants, copies of which are hereto attached.

Dated this 1st day of February, 1928.

Charles A. Houts, Kramer, Kramer & Campbell, and Samuel B. McPheeters, Attorneys for Defendants.

Service of Copy of the within petition and bond is hereby acknowledged this 1st day of February, 1928.

Jesse W. Barrett & E. A. Poulton, Attorneys for Plaintiff.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

PETITION FOR REMOVAL

[fol. 9] To the Honorable the Circuit Court of the City of St. Louis, State of Missouri:

Your petitioners, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and the Southern Railway Company, both corporations, respectfully represent that they are the two defendants named in the above entitled cause.

That this is a suit of a civil nature at common law, of which the District Court of the United States has original jurisdiction and has been brought and is now pending in this court, and has not been tried, and that the time before which these defendants, your petitioners are required by the laws of the State of Missouri or by any rule of this court, to answer or plead to the petition of the defendant herein, has not elapsed.

The value of the matter in controversy in said action is in excess of the sum of $3,000.00 exclusive of interest and costs, which appears from the allegations of plaintiff's petition.

Your petitioners further represent and aver that the plaintiff in this cause was at the time of the commencement of this suit, has ever since been, and now is a citizen and resident of the State of Missouri and of no other state; that your petitioner, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, one of the defendants herein, was at the time of the commencement of this suit, has ever since been, and now is a citizen of the State of Ohio and Indiana, by virtue and because of your petitioner being a corporation created and existing by and under the laws of said states of Indiana and Ohio and none other, and said petitioner never was, and is not now a corporation created or existing under the laws of the State of Missouri, and that it is not now, and never was a citizen of the State of Missouri; that your petitioner, the Southern Railway Company was at the time of the commencement of this suit, has ever since been, and now is a citizen of the State of Virginia, by virtue and because of said Southern Railway

Company being a corporation created and existing by and under the laws of said State of Virginia, and none other, and that said Southern Railway Company never was, and is not now a corporation created or existing under the laws of the State of Missouri, and that it is not now, and never was a citizen of said State of Missouri; and your petitioners further represent that under and by reason of the facts aforesaid this suit was at the time of the commencement thereof, and now is, a suit wholly between citizens of different states.

[fol. 10] Your petitioners further aver that there are no other parties, plaintiff or defendant, to this suit.

Your petitioners further represent that by reason of the facts in this petition shown, your petitioners, as such defendants, are entitled to, and desire to have this suit removed from said Circuit Court of the City of St. Louis aforesaid to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

And your petitioners offer herewith their bond, with good and sufficient surety, for their entering in said District Court of the United States within thirty days from the date of the filing of this petition, a certified copy of the record in this suit and for paying all costs that may be awarded by said District Court, if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners pray this Honorable Court to accept this petition and said bond, to approve the surety thereon, and to proceed no further herein except to make an order for the removal of this cause to said District Court of the United States, and to cause the record in this suit to be removed into the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a Corporation, by Charles A. Houts, Its Attorney. Southern Railway Company, a Corporation. Kramer, Kramer & Campbell, by Sam'l B. McPheeters, Its Attorney.

*Duly sworn to by Charles A. Houts and S. B. McPheeters. Jurats omitted in printing.*

[fol. 11] Bond on removal for $500.00, approved February 6, 1928, omitted in printing.

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[fol. 12] Clerk's certificate to foregoing transcript omitted in printing.

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[fol. 13] IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF ANSWER OF SOUTHERN RAILWAY COMPANY—February 9, 1928

Now on this day comes defendant Southern Railway Company and files herein its separate answer to the petition of plaintiff.

---

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANT SOUTHERN RAILWAY COMPANY—Filed Feb. 9, 1928.

Now this day comes defendant Southern Railway Company and for answer to plaintiff's petition herein denies each and every allegation thereof.

Wherefore, having fully answered, defendant, Southern Railway Company, prays to be hence dismissed with its costs in its behalf sustained.

Kramer, Kramer & Campbell, Saml. B. McPheeters,
Attorneys for Defendant, Southern Railway Company.

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IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF ANSWER OF CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY—Feb. 13, 1928

Now on this day comes defendant Cleveland, Cincinnati, Chicago and St. Louis Railway Company and files herein its separate answer to the petition of plaintiff.

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANT CLEVELAND, CINCINNATI, Chicago & St. Louis Railway Company—Filed Feb. 13, 1928.

Comes now the defendant Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a corporation, by its attorney, and for its answer to the plaintiff's petition filed herein, denies each and every allegation therein contained. [fol. 14] Wherefore, having fully [answer-] said defendant prays to be hence dismissed with its costs.

Charles A. Houts, Attorney for Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a Corporation.

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IN UNITED STATES DISTRICT COURT

ORDER SETTING CAUSE FOR TRIAL—March 23, 1928

Now on this day it is ordered that this cause be, and it is hereby set for May 10, 1928.

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IN UNITED STATES DISTRICT COURT

ORDER RESETTING CAUSE FOR TRIAL—September 20, 1928

Now on this day it is ordered that this cause be, and the same is hereby, set for trial on November 12, 1928.

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IN UNITED STATES DISTRICT COURT

ORDER DISMISSING CAUSE AS TO DEFENDANT C. C. C. & St. L. RAILWAY—October 12, 1928

Now on this day comes plaintiff in the above entitled cause and, by leave of Court, dismisses this cause without prejudice as to defendant, Cleveland, Cincinnati, Chicago & St. Louis Railway Company; and now said plaintiff, by

leave of Court, files herein his amended petition, making Southern Railway Company, a corporation, sole defendant.

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IN UNITED STATES DISTRICT COURT

No. 8124

JACK W. HUSSEY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

AMENDED PETITION—Filed Oct. 12, 1928

Plaintiff by leave of Court first had and obtained files this his first amended petition, and for cause of action plaintiff states that defendant Southern Railway Company is now and was at all times hereinafter mentioned, a corporation, duly organized and existing under and by virtue of law and as such was engaged in operating a railroad as a common carrier of passengers throughout various states of the United States.

[fol. 15] Plaintiff states that on the 2nd day of September, 1927, he became and was a passenger of the defendant and was enroute from Louisville, Kentucky to St. Louis, Missouri, and plaintiff states that while a passenger as aforesaid and when the train operated by the defendant had reached a point near Princeton, Indiana, said train did come into collision with another train causing plaintiff to be thrown in and about the car in which he was riding as a passenger, all of which occurred as a result of negligence and carelessness on the part of the defendant, its agents and servants and as a direct result of said negligence and carelessness plaintiff was seriously and permanently injured in this to-wit:

His head was bruised and contused; he suffered a concussion of the brain; his back and spine and neck, and the skin, muscles, tissues, tendons, ligaments, membranes, nerves and bones thereof were bruised, contused, wrenched, sprained, dislocated, separated and fractured and his nerves and nervous system were severely shocked and injured; that all of said injuries are serious and permanent;

that plaintiff has suffered with headaches, dizziness, nausea, insomnia, inability to concentrate, neurosis, severe pain extending down the right leg, pains in the abdomen and becomes easily exhausted; that all of aforesaid effects are serious and permanent; that plaintiff has suffered, is suffering and will in the future continue to suffer great bodily pain and mental anguish; that plaintiff has incurred and become obligated for medical and surgical attention, and will in the future be required to do so, and plaintiff has been injured and damaged in the manner aforesaid in the sum of Twenty-five Thousand Dollars ($25,000.00), for which sum together with his costs, he prays judgment against defendant.

Elleson A. Poulton, Jesse W. Barrett, and Mark D. Eagleton, Attorneys for Plaintiff.

Copy of the within amended petition received this 11th day of October, 1928.

Saml. B. McPheeters, Attorney for Defendant, per Wilder Lucas.

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[fol. 16] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED PETITION—Filed November 7, 1928

Now on this day comes defendant in the above entitled cause and files herein its answer to the amended petition of plaintiff.

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IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED PETITION—Filed Nov. 7, 1928

Now comes the defendant in the above entitled cause and for its answer to the amended petition filed herein denies each and every allegation in said petition contained.

Defendant for another and further defense states that the collision referred to in plaintiff's amended petition, as the result of which plaintiff claims to have been injured, occurred in the State of Indiana on or about the 2nd day of September, 1927; that at and for a long time prior to said date there was and still is in force in the State of

Indiana a statute providing for the incorporation of railroad companies under the laws of that State prescribing the powers of such railroad corporations, among which is Section 12931, Vol III. of Burns Annotated Statutes 1926, the Sixth Subdivision of which is as follows:

"Sixth. To cross, [intersection], [joint] and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad shall road shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid;"

That at and for a long time prior to said date, there was and still is in force in the State of Indiana the following statutes, known as Sections 13206, 13207 and 13208 of Vol. III. Burns Annotated Indiana Statutes 1926:

"Section 13206. (Contracts between connecting railroads.) 1. All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over [fol. 17] and upon the track and road of another railroad company, upon such terms as the said companies may agree upon."

"Section 13207. (Contracts Ratified.) 2. All contracts heretofore made in good faith between railroad [companies] [organized] under the laws of this state, acting by their respective boards of directors, by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, are to be run and operated over the tracks and road of another railroad company, are hereby ratified and made legal."

"Section 13208. (Liability to Third Persons.) 3. Every railroad that shall run and operate its locomotives and

trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

And defendant says that the Evansville, Indianapolis and Terre Haute Railway Company is a railroad corporation organized and existing under the laws of the State of Indiana; that at and for a long time prior to the 2nd of September, 1927 it owned a railroad track which connected with the track of this defendant at or about the place where the collision referred to in plaintiff's said petition occurred; that before the construction of said track and the making of such connection this defendant and the said Evansville, Indianapolis and Terre Haute Railway Company, acting by authority of their respective board of directors, entered into a contract which was in force and effect at the time of said collision, by the terms of which said contract it was provided that the connection between the track of this defendant and that of the Evansville, Indianapolis & Terre Haute Railway Company should be made and by which it was further provided that all switches, switching devices, signal devices and signal lights necessary and proper to the safe operation of said switches, should be installed and maintained by the said Evansville, Indianapolis & Terre Haute Railway Company; that pursuant to said contract said connection was made and said switches and signal lights were installed, and pursuant to which said contract said switches and signals and signal lights have been maintained at said point by said Evansville, Indianapolis & Terre Haute Railway [fol. 18] Company, and were so maintained at and prior to the time of said collision, and this defendant says that on said 2nd day of September, 1927 as defendant's train upon which plaintiff was then riding approached said connection between the tracks of this defendant and those of the Evansville, Indianapolis and Terre Haute Railway Company the signal lights at said switch were so set as to show to the defendant's engineer in charge of the locomotive hauling said train, that said switch was so set as to permit and require him to proceed without stopping at said switch,

and that relying upon said signals said train proceeded at its usual and customary rate of speed. But this defendant says that in truth and in fact said switch was so set as to turn defendant's engine and train on to the track of the said Evansville, Indianapolis and Terre Haute Railway Company upon which cars belonging to said latter company were setting and with which defendant's train was caused to collide; that through some defect or insufficiency in said signal light and the mechanism which controlled it, said light failed to disclose to defendant's said engineer the position of said switch, but on the contrary indicated that the switch was so set that defendant's said train would stay upon its track and would not be deflected to the track of the Evansville, Indianapolis & Terre Haute Railway Company. Defendant says that the condition of said switch and the condition of said light was not known to the defendant, its agents and employes in charge of its track and of said locomotive and could not have been discovered by them by the exercise of the degree of care required of them, and that said collision was not due to any negligence on the part of the defendant, its agents, servants and employes.

Wherefore, having fully answered, defendant asks to be hence dismissed with its costs.

Saml. B. McPheeters, Charles A. Houts, Attorneys for Defendant.

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IN UNITED STATES DISTRICT COURT

REPLY OF PLAINTIFF—Filed November 9, 1928

Now on this day comes plaintiff in the above entitled cause and files herein his reply to the answer of defendant to the amended petition of plaintiff.

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[fol. 19] IN UNITED STATES DISTRICT COURT

REPLY—Filed Nov. 9, 1928

Comes now the plaintiff in the above entitled cause and for his reply to defendant's answer to amended petition

filed herein, denies each and every allegation therein contained and set forth.

Wherefore, having fully replied, plaintiff asks for judgment as prayed for in his petition.

Mark D. Eagleton, Attorney for Plaintiff.

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IN UNITED STATES DISTRICT COURT

JURY EMPANELLED; TRIAL—November 12, 1928

Now on this day, come the parties in the above entitled cause, by their respective attorneys, and this cause having been heretofore set for trial on this day, both sides announce ready; and comes also the following jury, to-wit: H. Richards, Don Lucas, R. C. Hunt, Frank Pinnell, S. B. Misell, Thomas January, Harry S. Surkamp, Paul Allen, H. E. Lipe, Milton Yeary, Edward Rossen, Frank Andrews, twelve (12) good and lawful men who having been duly drawn, summoned and chosen are now sworn to well and truly try the issues herein joined and a true verdict render according to the law and the evidence. Whereupon, the introduction of the evidence in chief in behalf of plaintiff is commenced and concluded, and now the introduction of the evidence in behalf of defendant is commenced, but not being concluded at the hour of adjournment, it is Ordered that further proceedings on the trial of this cause be postponed until tomorrow at ten o'clock A. M.

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IN UNITED STATES DISTRICT COURT

VERDICT AND JUDGMENT—Nov. 13, 1928

Now on this day again come the parties in the above entitled cause by their respective attorneys, and comes also the jury heretofore empaneled and sworn herein as on yesterday; whereupon the introduction of evidence in behalf of defendant is resumed and concluded, and the jury after hearing the arguments of counsel for the respective parties and being duly charged and instructed by the Court retires

to consider of its verdict herein, which it afterwards returns into court in words and figures as follows, to-wit:

[fol. 20] Verdict

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID DIVISION OF SAID DISTRICT

No. 8124. At Law

JACK W. HUSSEY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

We the jury in the above entitled cause find the issues herein joined in favor of plaintiff, Jack W. Hussey, and against defendant, Southern Railway Company, a corporation, and assess the damages of said plaintiff in the sum of Twenty Thousand 00/100 Dollars ($20,000.00).

November 13, 1928

H. E. Lipe, Foreman.

It is, therefore, pursuant to the finding and verdict of the jury as aforesaid Ordered and Adjudged that plaintiff, Jack W. Hussey, have and recover of defendant, Southern Railway Company, a corporation, the sum of Twenty Thousand Dollars, ($20,000.00) as his damages herein so found and assessed by the jury as aforesaid, together with his costs and charges herein expended, for all of which judgment, costs and charges let execution issue in behalf of plaintiff against said defendant upon præcipe of plaintiff. (Verdict filed.)

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IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed Nov. 16, 1928

Now on this day comes defendant in the above entitled cause and files herein its motion for a new trial.

## In United States District Court

### Defendant's Motion for New Trial—Filed Nov. 16, 1928

Now comes the Southern Railway Company, a corporation, defendant in the above entitled cause and prays the court to set aside the verdict returned by the jury in the said cause and to grant a new trial for the following reasons:

1. The amount of damages assessed by the jury in said cause is excessive.

[fol. 21] 2. The amount of damages assessed by the jury is so grossly excessive as to evidence, bias and prejudice on the part of the jury in favor of the plaintiff against the defendant.

3. The verdict is not supported by any evidence.

4. The court erred in refusing to give defendant's instruction in the nature of a demurrer to the evidence.

5. The court erred in not giving each and every one of defendant's other instructions which were offered and were refused by the court.

6. The court admitted incompetent, irrelevant and immaterial evidence over the objection and exception of the defendant.

7. The court erred in permitting, over defendant's objections, plaintiff's counsel to interrogate defendant's witness Veith about statements claimed to have been made to said witness by other persons present shortly after the collision referred to in the petition and in the evidence, plaintiff's counsel at the time holding in his hand, from which he appeared to be reading, statements of such other persons, which questions and the manner in which they were asked, and the apparent fact that plaintiff's counsel was reading from written statements of such persons, tended to discredit said witness and enabled plaintiff's counsel to get before the jury in an indirect manner what appeared to be statements of such other persons concerning the cause of the collision, which statements were incompetent and which could not have been directly introduced in evidence.

8. The court erred in excluding competent, material and relevant evidence offered by defendant, and particularly the contract between the defendant and the Evansville, Indianapolis & Terre Haute Railway Company covering the installation and maintenance of the switch and signal lights at the point where the collision occurred.

9. The court erred in instructing the jury that the defendant Southern Railway Company was liable for the negligent acts of the employes of the Evansville, Indianapolis & Terre Haute Railway Company.

10. The verdict was against the evidence.

11. The verdict was against the weight of the evidence.

[fol. 22] 12. The verdict was against the law and the evidence.

13. The verdict should have been for the defendant.

Charles A. Houts, Sam B. McPheeters, Attorneys for Defendant.

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IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL CONTINUED—January 7, 1929

Now on this day, by consent of parties, it is Ordered that the motion of defendant for a new trial be, and the same is hereby, continued to the next regular motion day.

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IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL SUBMITTED—Feb. 4, 1929

Now on this day come the parties in the above entitled cause by their respective attorneys, and argue and submit to the Court the motion of defendant for a new trial herein.

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IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—June 17, 1929

Now on this day, the Court having considered the motion of defendant for a new trial, doth Order that such motion

be, and the same is hereby, overruled. (Memorandum opinion filed.)

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IN UNITED STATES DISTRICT COURT

OPINION ON DEFENDANT'S MOTION FOR NEW TRIAL—Filed June 17, 1929

Plaintiff was a passenger on defendants' train from Louisville, Kentucky, to St. Louis, Missouri. At Mine Junction, Indiana, the train collided with a train of the Evansville, Indianapolis and Terre Haute Railroad Company, which was standing on a siding. The tracks of the Evansville, Indianapolis & Terre Haute Railroad Company connected with the tracks of the defendant company at Oakland City, Indiana, from which point to Mine Junction the trains of the Evansville, Indianapolis & Terre Haute Railroad Company run over the tracks of defendant to Mine Junction. The defendant company by contract granted the Evansville, Indianapolis & Terre Haute Railroad Company this privilege acting under authority of Sections 13206, [fol. 23] 13207, and 13208 of the statutes of Indiana.

The collision occurred in the night time. Immediately prior to the collision a train of the Evansville, Indianapolis & Terre Haute Company came to Mine Junction and stopped prior to entering upon the tracks of defendant. The brakeman of the Evansville, Indianapolis & Terre Haute Company opened the switch but after the engineer of the train said that they did not have time to make Oakland City, the train did not enter upon defendant's tracks. the switch remained open and defendant's train left the main track, ran on to the siding and collided with the standing train.

The case was submitted to the jury and a verdict for $20,000 was returned for the plaintiff. The case was given to the jury on the theory that the employees of the Evansville, Indianapolis & Terre Haute Company were, for the purpose of this case, to be regarded as the agents of the defendant.

The defendant in support of its motion for a new trial contends that it is not liable for the acts of the Evansville, Indianapolis & Terre Haute Railroad Company because the

statute of Indiana authorized it to lease the use of its road to that company. Having statutory authority to make the lease, the lessor was not liable for the negligent acts of the lessee.

The statute of Indiana did authorize the railroad to grant authority to other roads to use its tracks. The statute further provides that a lessess shall be liable to third persons for damages done by its trains in the same manner and to the same extent as though it owned the road. There is nothing in the Indiana statute, as we see it, which releases a lessor road from the ordinary obligations of a carrier. It is true that this statute, unlike the statute of some of the states, does not provide that the lessor shall remain liable for all damages inflicted on its lines regardless of whether caused by the lessee or by the lessor. The statute neither adds to nor withdraws from railroads jointly using the same track the ordinary duties imposed by the law upon carriers of passengers.

The plaintiff has cited a number of cases to the effect that the lessor road is not responsible for damages inflicted as a result of the negligence of the employees of a lessee road. The early case of Arrowsmith vs. Railroad, 57 Fed. [fol. 24] 165, has been followed in subsequent cases cited. This case holds that where a railroad company leases its road by authority of law, the lessor is not liable for injuries to a passenger traveling under contract with the lessee when such injuries are caused wholly by the lessee's negligence in operating the road. Other cases cited by the plaintiff, such as Moorehead vs. United Railways Co., 119 Mo. Appeals, 541, same case, 203 Mo. 121, present a state of facts showing that the lessor surrendered under contract to its lessee the complete control of the road. Under these circumstances it was decided that the lessor was not liable for the acts of the lessee. This is not the state of facts that we have in the case at bar where the two roads were jointly engaged in using the tracks at the point where plaintiff's injuries occurred, and the doctrine of these cases is not controlling in the case here under consideration.

The plaintiff in this case was defendant's passenger, and, thereby, is entitled to all of the rights which the law accords to one in that relation. The defendant was obligated to exercise a high degree of care to safely transport

the plaintiff in accordance with the contract. This fact must not be lost sight of in the present case. The plaintiff was injured in a collision between the train on which he was riding and the train of another company. We are urged to say that the negligence which caused the accident was that of the employees of the Evansville road, and that the cause of action, if any, should be pressed against that company. There is authority in this circuit for holding that the carrier, guilty of negligence, is liable to a passenger being transported on the train of another road. Eddy vs. Letscher, 57 Fed. 115. But that case does not hold that the carrier of the passenger was not also liable. To so decide is to treat lightly the relationship existing between the plaintiff and the defendant. The situation here existing is somewhat like the duty which a railroad company owes to a passenger riding in a sleeping car. The carrier is universally regarded as liable for the negligent acts of the employees of a sleeping car company whose coaches are being transported. Pennsylvania Company vs. Roy, 102 U. S. 541. A case of a different character governed by the same principle is Mahony vs. K. C. Lys. Co. (Mo.) 254 S. W. 16.

A case illustrating the principle referred to above, and one identical, as we see it, to the case at bar, Harris vs. Union Pacific, arose in this circuit, 63 Fed. 800, and ultimately reached the Supreme Court, and is reported in 158 [fol. 25] U. S. 326. In that case some freight cars were delivered to a mining company which had control of a side track. These cars were permitted to run off of the side track on to the main track where a collision occurred and a passenger was injured. The trial court's instructions to the jury, that the act of negligence of the servants of the mining company is to be ascribed to the defendant, was approved in both appellate courts. A similar ruling was made in Dunn vs. The Pacific Railroad Co., 71 N. J. L. 25; 58 Atl. 165.

Judge Treat in this court, in Keep vs. Indianapolis & St. Louis R. R. Co., 10 Fed. 454, held that one who bought a ticket to St. Louis was entitled to recover from carrier for injury caused by another company in transporting him across the bridge at St. Louis.

This evidence shows that defendant had granted another road permission to enter upon its tracks at the switch in question, and to jointly use the tracks. The defendant was charged with the duty of exercising a high degree of care in maintaining its track at this as well as at all other places. The defendant might have opened and closed the switch itself, but, no doubt for good reason, it delegated that duty to its lessee. The servants of the lessee, knowing that defendant's train would presently approach, opened the switch, stood idly by, and permitted the train to leave the main track and collide with the freight train on the siding. Under these circumstances the defendant, as against this plaintiff, its passenger, cannot assert that the negligence of the lessee is not its negligence.

The doctrine of the above cases, it seems to us, was properly applied in the case at bar, and the motion for a new trial should be overruled.

Charles B. Davis, U. S. District Judge.

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IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 26, 1929

To the Honorable Charles B. Davis, Judge of said Court:

Now comes Southern Railway Company, a corporation, defendant in the above entitled cause, by Sam B. McPheeters and Charles A. Houts, its attorneys, and feeling itself aggrieved by the final decree of this court, entered on the 13th day of November, 1928, and the overruling of defendant's motion for new trial on June 17th, 1929, hereby [fol. 26] prays that an appeal may be allowed to it from the said decree to the Circuit Court of Appeals for the Eighth Circuit, and in connection with this petition said defendant herewith presents its assignments of error.

Said defendant further prays that an order of supersedeas may be entered herein, pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal.

Sam B. McPheeters, Charles A. Houts, Attorneys for Defendant.

## In United States District Court

### Order Allowing Appeal, etc.—Received, Filed, and Entered July 26, 1929

Now on this day comes defendant in the above entitled cause, by its attorneys, and files and presents its notice of appeal, with acknowledgment of service thereof on the plaintiff, and its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment heretofore entered herein on the 13th day of November, 1928, together with its assignment of errors on such proposed appeal; upon consideration whereof, the court doth order that an appeal be, and the same is hereby allowed defendant as prayed, and that upon its giving bond in the sum of Twenty-Five Thousand dollars within ten days from the date hereof, to be approved by the judge or clerk of this court, said judgment be supersedeas pending the determination of said appeal. It is further ordered that the defendant be granted sixty days from the date hereof within which to file its bill of exceptions, and a citation is issued directed to plaintiff citing and admonishing him to be and appear in said United States Circuit Court of Appeals within sixty days from and after this date, which citation is duly acknowledged by plaintiff and filed.

And now defendant files herein its præcipe for transcript, such præcipe bearing acknowledgment of service by attorneys for defendant.

Charles B. Davis, United States District Judge.

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## In United States District Court

### Assignment of Errors—Filed July 26, 1929

Now comes the Southern Railway Company, a corporation, defendant in the above entitled cause, by Sam B. Mc- [fol. 27] Pheeters and Charles A. Houts, its attorneys, and in connection with its petition for appeal says that in the record proceedings and in the final decree entered in said

cause, manifest error has intervened to the prejudice of the appellant, to-wit:

I

The court erred in excluding and refusing to permit the defendant to introduce in evidence the contract between defendant, Southern Railway Company and the Evansville, Indianapolis and Terre Haute Railway Company, dated the 11th day of January, 1922.

II

The court erred in charging the jury as follows:

"The court further charges you, as a matter of law, that under the circumstances in evidence, the Southern Railway Company is responsible for negligent acts, if any, on the part of the Evansville, Indianapolis and Terre Haute Railway Company in the operation of the switch mentioned in the evidence."

III

The court erred in charging the jury as follows:

"The court charges that the Southern Railway Company is responsible for the negligent acts, if any, of the agents and servants."

IV

The court erred in refusing to give defendant's instruction in the nature of a demurrer to the evidence, offered at the close of all the evidence.

V

The court erred in refusing to give each and all of defendant's other instructions offered by it and refused by the court.

VI

The court erred in permitting, over defendant's objections, plaintiff's counsel to interrogate defendant's witness, Veith, about statements claimed to have been made to said witness by other persons present after the collision referred to in the petition and in the evidence, plaintiff's counsel at

the time holding in his hand, from which he appeared to be reading, statements of such other persons, which questions and the manner in which they were asked, and the apparent fact the plaintiff's counsel was reading from written state-
[fol. 28] ments of such persons tended to discredit said witness and enable plaintiff's counsel to get before the jury in an indirect manner what appeared to be statements of such other persons concerning the cause of the collision, which statements were incompetent and which could not have been directly introduced in evidence.

VII

The verdict and judgment are grossly excessive and are the result of sympathy, bias and prejudice in favor of the plaintiff and against the defendant.

Wherefore appellant prays that the judgment of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri be reversed.

Sam B. McPheeters, Charles A. Houts, Attorneys for Defendant.

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In United States District Court

Præcipe for Transcript of Record—Filed July 26, 1929

The Clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Eighth Circuit, by including therein the complete record in said cause.

Dated St. Louis, Missouri, this 26th day of July, 1929.

Sam B. McPheeters, Charles A. Houts, Attorneys for Appellant.

Service of the within Præcipe and receipt of a copy acknowledged this 26th day of July, 1929.

Mark D. Eagleton and Jessie W. Barrett, Attorneys for Appellee.

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[fol. 29] Bond on appeal for $25,000, approved and filed July 30, 1929, omitted in printing.

[fol. 30] IN UNITED STATES DISTRICT COURT

FILING OF BILL OF EXCEPTIONS—Sept. 17, 1929

Now come defendants and present their bill of exceptions; whereupon such bill of exceptions is approved, signed, filed and ordered made a part of the record herein.

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IN UNITED STATES DISTRICT COURT

**Bill of Exceptions**—Filed Sept. 17, 1929

CAPTION

Be it remembered: That upon the trial of this cause, during the September Term, A. D. 1928, of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, upon the 12th and 13th days of November, 1928, before the Honorable Charles B. Davis, District Judge, and a jury, the following proceedings were had:

Appearances

For Plaintiff: Mr. Mark D. Eagleton and Mr. Ellis S. Poulton.

For Defendant: Mr. Charles A. Houts and Mr. Samuel B. McPheeters.

The plaintiff, to sustain the issues in his behalf, offered and introduced the following evidence:

JAMES F. MCFADDEN, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. Eagleton:

Q. Doctor, will you please state your full name?
A. James F. McFadden.
Q. And your business or occupation?
A. Physician.

Q. And of what medical school are you a graduate?

A. St. Louis University.

Q. What year?

A. 1913.

Q. Doctor, have you been connected with any institution since your graduation in 1913?

A. I have served approximately one year as an interne at Alexian Brothers Hospital, and one year as resident neurologist at Alexian Brothers Hospital, and one year at the Boston Psychopathic Hospital, two and a half years as assistant superintendent of the Foxboro State Hospital [fol. 31] in Massachusetts, two years as neuro-psychiatrist in the United States Army, six months post-graduate, neurology, University of Pennsylvania, and since then I have been connected—on the visiting and consulting staffs of numerous hospitals about town, and I am assistant professor of nervous and mental diseases at St. Louis University.

Q. How long have you been assistant professor of nervous and mental diseases at St. Louis University?

A. I have been teaching at the school and have been on the faculty at the school, actively teaching, since I returned from the service, but before that I was on the doctors' faculty.

Q. Doctor, of what hospitals are you on the visiting staffs?

A. I am now on the staff of the City Hospital, St. Johns and the Jewish, and on the consulting staff of the Farmington, Missouri—Missouri State Hospital No. 4 at Farmington, Missouri.

Q. Doctor, I believe your specialty is in nervous and mental diseases?

A. Yes.

Q. Did you have occasion to examine the plaintiff in this case, Mr. Jack W. Hussey?

A. I did.

Q. I believe you made that examination at the request of his attending physician, Doctor Backlar, did you?

A. I did.

Q. About when was it that you made your first examination of him?

A. I believe it was on or about May 7th.

Q. Of what year?

A. Of last year.

Q. This present year, 1928?

A. Yes. Last May.

Q. Doctor, will you tell us what you did, in making your examination, and what your findings were in those respects? If you can, in using any language that seems to be unusual or big-sounding, I wish you would explain it, so that we will all get what you mean, please.

A. Yes. Well, first of all, I took his history, I discussed his past history, to find out whether or not there was anything that had occurred in his past life that might have influenced his present condition. Then I also discussed his family history, to see whether there was anything there that might have been of any influence. Then we discussed the accident, how he was struck, and what happened, and whether or not he was conscious or unconscious at the time, and things of that sort; in other words, I got a description from him, as well as possible, about what happened, and then how he felt afterwards. Then after we got that, I went over him, checked over his general nervous system, to find out whether or not there were any changes to show as the effect of the accident.

[fol. 32] Q. Now, when you say you checked over his general nervous system, what tests do you make—what are they called—that enable you to determine about that?

A. Well, for instance, we tested the reactions of the pupils of the eye to light, by shining a light into the eye; the pupils will contract; if they do not contract, it usually indicates some unsatisfactory condition; whereas, I just mentioned that as one of the tests, although they reacted all right in this case, we also tested their movements of their arms and legs, different parts of the body, to see whether there were any signs of paralysis; then we tested what we call their reflexes, that is, by striking a certain part of the body, let us say just below the knee, quite frequently some of us have noticed, if you strike that, your knee will jerk out; we call that a reflex; because we have irritated the skin here and the sensation of that goes into the central nervous system and stimulates the part of it that controls the muscles and causes that muscle to jerk; we call that a reflex; well, we test those in different parts of the body, to see if there is anything wrong. For instance, if they were absent here (indicating), we would want to find out what

caused it to be absent, whether something in the nerves or muscles, or where it may be, so we tested these reflexes over the entire body; all the reflexes we are accustomed to examine at such examinations; then we noticed his general facial expression, then tested his sensation, that is, his feeling, by taking a pin and sticking the pin in various parts of the body, to find out whether or not he could feel it, as a pin, or as distinctly in all parts of the body.

Q. Did you find anything abnormal in his reflex test, or in the tests that you just mentioned, that aided you in determining what he was suffering from, if anything?

A. In the reflex tests, I found that in testing, for instance, in the upper extremities, they were not as active, that is, in the arms, they were not as active as we usually find them. In the knees, testing the knees, they are supposed to be equal; his were more active on one side than the other; I believe it was the left side that was more active. Then we have a test where we strike them here (indicating the ankle), and we get a response of the foot; that was also more active of the left; in other words, they were unequal. Then I found that, in testing him with the pin, that the sensation was decreased in his legs, and by testing with this pin up to here (indicating the knee) we found that up to about the knee, or probably just a little above, on both sides, the sensation was decreased in the lower part of the leg, where above it was normal, that he could feel very [fol. 33] little of that pin below, and it was also true in one arm. Now, I do not just recall which arm that was. It has been quite a while, and at the time—I might make a mistake if I tried to tell which arm it was; I believe probably it was the left.

Q. Now, Doctor, what were the results of those tests—what did they indicate to your mind, as a neurologist, by way of any condition he was suffering from?

A. Well, the inequality of the reflexes suggested to me that there was an organic change in his nervous sytsem.

Q. Did you come to any opinion as to the character of the organic change?

A. Well, I would say that a history of the man who had been struck on the head and had a slight period of unconsciousness, with reflex changes following, as I found them, I would give the opinion that that man had what we call a traumatic encephalitis. Now, to translate that, we would

say traumatic means it was due to an injury, blow, or something of that sort, and encephalitis is an inflammation of the brain, and I would say that he had suffered from an inflammation of the brain that was due to an injury; then on account of the changes in the sensation, that is quite typical of what we call a functional nervous disease, that is, a disease in which the function is disturbed, but we cannot find anything organic, I would call that a traumatic neurosis.

Q. Now, Doctor, with reference to this organic change that you have described, in common words meaning an inflammation of the brain, or this functional neurosis, either one of the two, do you of necessity have to have a fracture at any place, of any bone, or in particular do you have to have a fracture of the skull, in order to produce those [systems] and that condition?

A. No. Any injury may cause that. In fact, the injury to the brain is not in proportion to the damage done to the bone. An individual may have a serious brain injury, with no fracture, or they may have a big fracture with less brain injury.

Q. Are there many of such cases of record in the medical history which you are required to study in order to qualify yourself as a neurologist?

A. There are. I know of cases.

Q. Where a man has suffered a very severe brain injury, that has often resulted in death, without there being a single break any place?

[fol. 34] A. I had it happen to a personal friend, a doctor, who had had no skull fracture and had his brain torn almost completely in two, and another friend, doctor, in the same accident who had a marked skull fracture and who is alive and working today.

Q. Now, Doctor, when you have an inflammation of the brain sufficient to produce symptoms, is that inflammation of the brain subject to being X-rayed, so that man can take a picture and look at it, any man, and say there is present an inflammation of the brain, or is that something you must get from the symptoms and from the other matters that you find?

A. The X-ray cannot show that, because often it is just a very small hemorrhage over numerous areas of the brain, and even then, in even the large cases of the brain injuries,

the X-ray shows absolutely nothing; we have to depend upon the findings.

Q. Is that true because of the fact that the X-ray itself is only accurate in determining bone pathology and bone diseases?

A. Only in bone and other conditions that show very dense shadow.

Q. I see; and such an inflammation that you have been speaking about would not show sufficient density then, if I may use that word, to permit an interpretation by X-ray, is that it?

A. No. I have never seen one case that X-ray would help.

Q. Now, Doctor, when you find a man suffering with these organic changes, and also the functional neurosis, how does it manifest itself in the patient—let me allude, if you will, please—does it cause headaches and inability to sleep—those are two of the symptoms, we will say, here—does it cause those things?

A. Usually, in these neuroses, they are very nervous and what I call "tense"; in other words, they are pretty well keyed up, and the slightest noise or anything irritates them and causes them to jump; in other words, I explained to my patients that everything is magnified, their sensations, incoming impressions and the things that worry them, everything is magnified, and naturally their reactions are magnified—their reactions to these, and they suffer more from things, or suffer from things that the average person would not pay any attention to. Then in these brain injuries, we often have emotional disturbances, that is, individuals who have had an injury to the brain find out afterwards that they are more irritable about their work, they disagree with their fellow employees, and at home, and they have difficulty in sleeping, and often dream and have restless sleep.

[fol. 35] Q. Doctor, if he testifies that he has such inability to sleep and has such headaches, would you say then that those are natural symptoms to be expected from the condition that you found?

A. I would say that those are to be expected to accompany the picture that I have described.

Q. With reference to the use of the word "magnified", when you say that the reactions of the patient are magnified, let me ask you—that magnification, is that something that is controlled by the patient, or is that something that is involuntary to the patient, under these circumstances?

A. Oh, yes, it is something that he does not control.

Q. Doctor, this man, in addition to the two symptoms that I have mentioned, complains while at work of an inability to coordinate, to think in the proper, normal manner; is that a symptom that is suggestive of this condition?

A. It is.

Q. I believe, in addition to those three symptoms, he complains also of a vertico or a dizziness in the afternoon, after having been at work some period of time, things get dark, dizzy in front of him: is that a common symptom from such ailment?

A. That is common, and also comes on when they are overheated, if they are in a place where it is warm.

Q. You made, in order to check up on your past findings in May, and in order to refresh your recollection of the conditions, you made, a few days ago, another subsequent examination?

A. On Friday.

Q. And that was, of course, to permit you to tell this Court and jury what the present condition is, as well as you could find it, is that right?

A. Yes. Without looking over the former record, I checked and then compared the two, and I found that these reflex changes, as described, have remained just as they were the first time I examined him.

Q. With that in mind—that there has been no improvement in his condition over that period of time from May until November, what would you say is the prognosis of this man's case?

A. Well, of course the prognosis would not be as favorable as if he had shown some improvement. It he had shown some improvement, we would feel, well, this man is going on to an ultimate recovery, but if the condition remains stationary over a number of months, why it is not so favorable.

[fol. 36] Q. And when you say it is not so favorable, what is your opinion as to future pain and suffering and

disability of the kind that you found present on either of your examinations?

A. One would have to be a prophet, to tell exactly what will happen, but it is my opinion that there is going to be comparatively little, if any, change.

Q. Now, can those conditions that you found occur in the manner of trauma, occur through a trauma is that—induced by a collision of trains while he is a passenger on the train and being thrown about as a result of that collision, is that character of trauma sufficient to produce those results?

A. The physical trauma is sufficient to produce an unconsciousness and changes in the brain. The mental trauma, that is, the mental upset that anyone would go through, awakening in the night, in an accident of that sort, is enough to cause the other, and the combination of the two would work together.

Mr. Eagleton: I believe that is all.

Cross-examination.

By Mr. Houts:

Q. Doctor, as a neurologist, you frequently discover people that think there is something the matter with them, when the fact is you cannot discover there is anything the matter, is that true?

A. That is true.

Q. Now, you spoke about sticking pins in his legs and observing the response of that cause. That varies in different people doesn't it?

A. Well, we have what we know as an abnormal reaction, though that does not occur in everyone. Whenever we find it, we figure that it is abnormal. Their conduct varies, but when a man runs down the street, shooting, why I know that he is abnormal.

Q. But what I say is true, isn't it, that that varies in different people?

A. It varies, within a certain limit, but no wide limit.

Q. Don't you know that a man, some one man will knock his shins on a corner of a wall or something, and pay no attention to it, maybe knocking skin off, and another fellow immediately thinks he is about half dead, isn't that true?

A. Well, that all depends on how much the man is intent on something else. If a man is intent on something, he may bump his leg and not know he is hurt until an hour or so [fol. 37] afterwards, and another man may be the type that he is thinking at the time, and he suffers more.

Q. Well, you take two of them that are both intent, one man will react to that matter and another won't, isn't that true?

A. None of us react the same to some things.

Q. That is just what I meant.

A. Absolutely the same.

Q. Sure. You did not find anything organically the matter with this plaintiff, did you?

A. I just stated that I did.

Q. Organic?

A. Organic. His reflexes were unequal.

Q. Well, outside of that, you did not discover anything—there wasn't anything, except what you say, those reflexes?

A. Well, of course I just confined it to the nervous system. There may have been something in his muscles or other parts of his body—bones, but mine was confined to the nervous system.

Q. You say his eyes reacted all right?

A. Yes.

Q. And the only thing you found was a little difference in the reaction of one leg from the other?

A. I did not hear that question.

Q. I say, practically all you discovered was a little difference in the reaction of one leg from the other?

A. I said that, but I left out that word "little."

Q. Well, put it that way—there was a difference?

A. There was a difference.

Q. It was not very great, though, was it?

A. Well, it depends on what you mean by "very great." We never expect to find them very great.

Q. Well then, we will call it—how would you describe it, then, the difference between one leg and the other?

A. They were unequal, and when they are unequal it means——

Q. How much unequal?

A. Well, that is pretty hard—in some things, the slightest difference—now, for instance, if I strike this leg (indicating), it is possible that it may kick up like that, but very,

very seldom so that would mean a great difference, whereas this one might just come up like that.

Q. Well, you find that in the average man, don't you, at times, one different than the other?

A. Not if they are normal.

Q. Not if they are normal?

A. No. If that happens, there is something wrong.

[fol. 38] Q. Those things may come from disease, too, isn't that right?

A. Possibly.

Q. Frequently do, too, isn't that right?

A. Yes, sir.

Q. And doesn't it frequently occur that a person's nervous reactions change sometimes for no reason that you can discover, isn't that true—a man gets older, for instance, if he works hard, or drinks a good deal, or does a lot of other things, that has an effect on him, doesn't it?

A. Surely.

Q. Sure. Very frequently you find these things occurring from overwork, don't you?

A. From overwork?

Q. From overwork.

A. I have never seen a man with unequal reflexes, from overwork.

Mr. Eagleton: I believe that is all, Doctor.

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Joseph Backlar, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. Eagleton:

Q. Kindly state your name to the Court and jury, please?

A. Joseph Backlar.

Q. And you are a physician and surgeon, of this City, are you?

A. Yes.

Q. Of what medical school are you a graduate?

A. St. Louis University.

Q. What year, please?

A. 1923.

Q. Doctor, you office out on Gravois Avenue, close to the plaintiff's residence, do you?

A. Yes, sir.

Q. Have you been attending him since the day after this collision, or the day of this collision, September 3, 1927?

A. I attended him that same day, September 3rd.

Q. The same day which it occurred?

A. Yes, sir.

Q. You called at his home, did you?

A. At his home, yes, sir.

Q. Will you tell us what his then condition was, what you found him suffering with, what condition he was in? You may use any notes that you made at the time, to assist you, if you wish?

A. At the time he called me, he was suffering from partial consciousness—that is, he was partially irrational, he did not know where he was, to a certain extent; extreme [fol. 39] dizziness, severe headache, he showed extreme symptoms, like nausea and vomiting, his stomach was very large and congested. He complained of severe backache at the time; as a matter of fact, he could not find a place in bed where he could lie at ease; and very muchly excited—by that, I mean he was restless and nervous and could not rest at all; he was very uneasy. Those were the gross symptoms. Upon examination, I found there was a discoloration and a little swelling at the back of his head, on the right side, including part of his neck, and that there was a red spot on his back about the size of a half a dollar, right between the third and fourth lumbar vertebræ, about the region. Those were the main things that I found.

Q. Now, Doctor, did you continue thereafter to see him from time to time, to determine his condition?

A. Why, I attended to him—as a matter of fact, I am attending to him at the present time.

Q. How often did you see him at the outset?

A. I saw him twice a day and sometimes—that was twice a day, and every day—that is, as often as two or three times a day, I had to see him.

Q. Did you give him sedatives, to quiet his nerves, induce sleep, things of that kind?

A. Yes, that is primarily what I had to give him originally.

Q. Now, with reference to his back, did you make any diagnosis as to the condition of his back, what you found him suffering from, from a physical standpoint?

A. Well, originally I thought there was a bone pathology, that is, some fracture along that vertebræ, and eventually I obtained, took an X-ray picture, and corroborated my diagnosis, that is, to a certain extent, and he showed only symptoms like there as a certain fracture of that vertebræ at the time.

Q. Are you giving it then, now, as our opinion, that he did have a fracture of one of the vertebræ, or not, in your judgment?

A. Yes; at that time, I was quite certain that there was nothing else but a fracture of that vertebræ at that time.

Q. Now, with reference to the softer structures of the back, that is, the muscles and ligaments and nerves and tissues, especially the ligaments that support the spine itself, did you find evidence of damage to those parts?

A. There is no question but that there was a considerable amount of damage to the softer structures.

Q. What is the nature of the damage to the muscles, ligaments and [pendons], in your judgment?

[fol. 40] A. Well, there was a condition—there was a loss of continuity, that is, there was a fracture, the muscles were apparently torn, contused, there was considerable swelling, and the blood vessels were probably severed at that particular place.

Q. Doctor, in order to treat that kind of an injury to the back, did you immoblize the back, and have it taped?

A. Yes.

Q. Change the tape from time to time?

A. Yes, sir.

Q. And then later, I believe, you resorted to more drastic means, by having a brace prescribed, is that right?

A. Brace, yes, sir, which he is still wearing.

Q. He has been under your care right along, isn't that true?

A. He has been under my care, yes sir.

Q. So far as the nerves and neurology is concerned, you had him examined by Doctor McFadden?

A. Yes, sir.

Q. And then got the benefit of his report in that way, is that right?

A. Yes, sir.

Q. Doctor, in your judgment, taking particularly the injury to the back, is that an injury which is a disabling injury, so far as the normal using of that back is concerned?

A. Well, considering the length of time that injury occurred, there should have been a considerable improvement, but Mr. Hussey, as a patient of mine, he repeatedly comes to the office for relief of that kind, which, besides that brace, I take him up and probably give him a diathermic treatment, by electricity or heat, and then put him to bed for a day or two, and he then comes to receive treatment, and then later on the same thing over again, that is, he has to favor that back of his; if he forgets himself and he lifts anything heavy, or if he is on his feet a great deal, he will always come to me then and complain about that matter.

Q. Doctor, is it your judgment that he has suffered a permanent injury to his back?

A. In my opinion, he did.

Q. It is your judgment that, in the future, he will be necessarily required to continue to have artificial means of support to the back?

A. Yes, sir, I think he will.

Q. Did you have to give him medicines, to try to get him to sleep for, a number of days following this accident?

A. Why, as a matter of fact, for a number of weeks.

Q. For a number of weeks?

A. Yes. His head—seems that he is suffering from aches, headaches, off and on, and he aches—often, lately, he [fol. 41] has been coming to the office for some kind of relief for the headaches, and it don't seem to be amendable to ordinary medication, that is, I have to use drastic measures in his particular case.

Mr. Eagleton: That is all, Doctor.

Cross-examination.

By Mr. Houts:

Q. Doctor, when was it that you say you prescribed the brace?

A. I presume it has been about a few weeks ago. I don't remember exactly the date, but it has only been a few weeks ago he has been wearing the brace.

Q. Recently?

A. Very recently, yes.

Q. Now, you spoke about some muscles being torn. How did you determine that?

A. Well, in every case of contusion, whenever there is discoloration, there is always a certain amount of severance of the softer tissues, particularly of the blood vessels, and in the case the blood vessel severs, there is the exudation of the [blook] and serum, invariably to a certain amount of damage to the muscle. It is either through pressure or otherwise, that always destroys a certain amount of muscle.

Q. You mean that if I get kicked on the leg here (indicating), I will have muscles torn?

A. The deep muscle fibres, that would be destroyed absolutely.

Q. Whenever there is discoloration from a bruise, are the muscles torn?

A. There would be muscular fibres that would be torn; perhaps you cannot see them grossly, but microscopically you would see miscroscopic tissues, that those fibres or cells would be torn or damaged.

Q. Now, you do not mean to tell the jury that in this case you know of any muscles being torn, muscles that appear in different members of the body, do you?

A. Well, to my mind, at that time, his inability to use those particular muscles, I was inclined to believe, although there was no other means of proving it, through X-ray or otherwise, that those muscles were actually destroyed.

Q. Well, that is just a mere guess, then, on your part, that the muscles were torn?

A. According to the symptoms, I would say that that is what the symptoms are in the particular case, or in similar cases, were consider that injury to the muscle.

Q. Where did you see that discoloration?

A. It was between the third and fourth lumbar vertebræ.

[fol. 42] Q. Where is that—so that [they] jury will know just where that is, where is the third and fourth lumbar vertebræ?

A. That is in the back. That is what we call, ordinarily, the small of the back, just about the center; of course, I could show it on my body, it would be about there, right

about there (indicating); of course, that is approximate; but there was a red spot there for quite a while; in fact, several months.

Q. How big was that red spot?

A. About the size of a half a dollar.

Q. Was it one side of the spine?

A. It was more to the right side.

Q. I understood you to say that you still say that there was a fracture of one of those vertebræ?

A. Yes; and I have X-rays to show that, and I think I can point out that particular location where I found that, and it seems to correspond very much to that, that is, to the bone.

Q. Did you take the X-ray yourself?

A. I took them myself, yes.

Q. Now, have you a record of how many times Mr. Hussey came to see you?

A. I have a record at the office, yes, sir.

Q. You haven't it here?

A. I haven't it with me, no, sir, but I saw him very frequently, and as a matter of fact, there is seldom a week now that he does not come up to the office once or twice a week, except when he is feeling pretty well.

Q. He lives near you, doesn't he?

A. Yes, sir; he lives about a block away from my office.

Q. You say that you had Doctor McFadden examine him?

A. Yes, I had Doctor McFadden examine him.

Q. At whose suggestion?

A. I suggested it myself.

Q. You did?

A. Yes, sir.

Q. Attorney General Barrett did not suggest it?

A. Sir.

Q. I say, Attorney General Barrett did not suggest it?

A. No, sir.

Q. Mr. Poulton?

A. Attorney Barrett and Poulton, they recommended someone else, but I recommended Doctor McFadden, because I worked with him for a while, and I thought that he could give me better results in that case.

Q. Now, you say that right at the first, there, when you saw him, that he was not suffering from unconsciousness, did you say?

A. He was partly rational. That is, he was not like an average individual would be, that is healthy, or just merely [fol. 43] sick; he did not know just where about he was, at times; he was just like things were swimming in front of him. He was, I would say, partly rational at that time I first saw him.

Q. You saw him at his house?

A. I saw him at his house.

Q. The first time?

A. The first time.

Q. Was he in bed?

A. In bed, absolutely. He could not as much as raise his head, without everything going around.

Mr. Houts: That is all.

Redirect examination.

By Mr. Eagleton:

Q. Could you give me the reasonable amount of your bill to date?

A. Well, I tried to figure it the other day, but it amounts to about $800.00.

Q. Eight hundred dollars?

A. Yes, sir. I have the X-rays, if you want to see those.

Q. You may leave them here, if you will, Doctor.

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F. G. Pernoud, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. Eagleton:

Q. Will you please state your full name to the Court and jury?

A. F. G. Pernoud.

Q. And what is your business or profession?

A. I am a surgeon.

Q. And of what medical school are you a graduate?

A. Washington University.

Q. What year did you graduate from Washington University?

A. In 1907.

Q. You have been practicing medicine here then in the City of St. Louis for more than twenty years, have you?

A. Yes.

Q. Have you been connected with any medical institutions here in the City of St. Louis?

A. I have.

Q. What are those institutions, please?

A. I have been connected with Barnes Hospital, with the Barnard Free Skin & Cancer Hospital, the Alexian Brothers Hospital, Josephine Hospital, the Lutheran Hospital; was the organizer and director of the medical department of [fol. 44] the Red Cross in the Seven Southwestern States; was a teacher in surgery at Washington University; was a medical officer in the United States Army.

Q. You say you were a teacher of surgery at Washington University?

A. Yes, sir.

Q. And you say that you were the organizer, yourself, of the medical department of the American Red Cross in these Seven States, Southwestern States?

A. Yes, sir. I organized that before the American entrance in the World War, and had charge of the Red Cross operations in the Southwest for—through the war and for several years thereafter.

Q. Now, Doctor, I believe a short time ago, at my request, to permit you to testify as to your findings before this Court and jury, this patient was sent to you, and you made an examination of him, did you?

A. I did.

Q. Will you tell us, Doctor, what you found, upon making an examination of him, and what your conclusions were, with reference to those findings?

A. I found that he wears a specially designed corset for the support of his lumbar spine, which is the part of the spine about the waist-line. There is a prominence and a contraction of the muscles——

Mr. Houts: What is this gentleman reading—is he reading a letter or—apparently he is reading from something there (indicating).

Mr. Eagleton: If the Court please—Doctor, those are notes that you made of the conditions that you found of this gentleman, are they?

A. These (indicating) are the notes that I made at the time of my examination of Mr. J. W. Hussey.

Q. You can testify—I suppose he can testify from notes that he made, if Your Honor please.

The Court: Yes; you may use the notes, Doctor. You ought not to read them, though. Testify and use the notes to refresh your recollection, if that is necessary.

Q. Can you testify then, Doctor, without the reading? You can refer to it any time you want to?

A. Yes, I can, but these merely call the points to my mind.

[fol. 45] Q. That is all right. Just don't read it verbatim, then, just recall whatever refreshes your recollections, and then go ahead and testify.

A. There is a prominence of the muscles and a contraction of those muscles on the right side of the back of the neck. There is a tenderness over the right side of the back of the head, the region that we call the occipital region. All of the muscles on the front and the right side of the neck are in a state of contraction. There is tenderness on pressure over the lumbar spine, the lower end of the lumbar spine, and tenderness on pressure over the right sacroiliac joint, which is the joint between the spine and the pelvis bone on the right side. There is also a slight bogginess, a swelling, in the tissues over this joint. He bends his body over sluggishly, and in fact all movements of his body are rendered rather sluggish; in other words, much more sluggish and inactive than normally. There is a fine tremor in both hands. The muscles of the whole left arm and forearm are correspondingly greater than the muscles in the right forearm. His knee reflexes are increased, the left being increased more than the right. There is a decrease in—or a diminished sensation in both legs up to about the knee, or a little higher, and a decreased sensation in the whole left forearm and hand. That covers my findings.

Q. Now, Doctor, what were your conclusions—after examing him, I believe you examined him again to check up on what you found, did you?

A. I did.

Q. And what were your conclusions with reference to those findings, as to any disability he is suffering from, to the extent of that disability, as to whether it is severe or not?

A. He unquestionably, because of the reflex change, as shown in his knee reflex, it seems that he has some organic disturbance of the brain; that is, there has been some injury or violence to the brain which is still showing its mark in examination. The other changes in sensation and the weakness of the left arm would indicate that there is a so-called "functional change" in the nervous system. The tenderness that is to be found about the small of the back, the lumbar spine and the right sacro-iliac joint would indicate that there is still an inflammatory disturbance in those structures.

Q. Doctor, is it your opinion, after examining him, that his back requires immobilization or requires something on it to hold it immobile, to make it properly function?

[fol. 46] A. Yes; I think the wearing of a support, such as he now wears, immobilizes, to a certain degree, his spine, which gives him more comfort and some freedom from pain.

Q. What is your judgment as to the cause of these contractions of the muscles in certain parts of the back, and the bogginess or swelling that you found and mentioned to the jury?

A. The contraction of the muscles that I described about his neck, particularly the right side of the back of the neck and the front and right side of the neck is probably because of the inflammatory condition of the brain. The pain in his back and the swelling about the lumbar spine and the right sacro-iliac joint are probably a low grade inflammatory process resulting from injury to those parts, either a straining or tearing of ligaments or muscles.

Q. Considering the amount of time now elapsed, would you venture an opinion as to what injuries, if any, of those you have mentioned—and describe which—are of a permanent character?

A. I think that there may be some clearing up of the functional neurosis, insofar as the censory changes are concerned, that is, the feeling of pin pricks and sensation of the skin, but the organic changes in the brain is a permanent condition, and the condition about his back is probably a permanent condition at present.

Q. Are those conditions, in addition to having been painful in the past, are they conditions from which you could say, as a physician, he is reasonably certain to continue to suffer pain in the future?

A. He will.

Mr. Eagleton: That is all.

Cross-examination.

By Mr. Houts:

Q. Do I understand that you do not hold out any hopes for his getting better?

A. Yes, I do hold out some hope that he will get better, insofar as the functional neurosis is concerned. That is the inability to sleep, his restlessness, and the sensory changes, but insofar as the organic changes are concerned, that is the direct evidence of partial destruction of inflammation of the brain is concerned, he will not make any improvement from that condition.

Q. I understood you to say that so far as those disturbances that you say you found in his back, down to the sacro-iliac joint, that that would not improve at present. What did you mean by saying "at present"?

[fol. 47] A. Had not improved at present—oh!—and it is my judgment that he will continue for a long period of time to suffer disability in those parts.

Q. You cannot estimate that time?

A. No.

Q. No. Now, in speaking of this tenderness in the lumbar region of the spine and at the sacro-iliac joint, would you say that that came from a blow on those places?

A. Yes, I would, having in mind the history of this case.

Q. Doctor, is it possible, from a medical standpoint, to have both a functional and an organic disturbance at the same time?

A. Yes, sir.

Mr. Houts: That is all.

Mr. Eagleton: That is all, Doctor.

At this point, the Court having duly admonished the jurors touching their proper conduct while they shall be absent from the Court room, a recess was had until two o'clock P. M.

After recess, at two o'clock P. M., on November 12, 1928, the following proceedings were had:

JACK W. HUSSEY, the plaintiff, of lawful age, being duly produced, sworn and examined, testified on his own behalf as follows:

Direct examination.

By Mr. Eagleton:

Q. When you answer questions, please speak out as loud as you can, so that everyone can hear you. What is your name?

A. Jack W. Hussey.

Q. How old are you?

A. Twenty-eight years old.

Q. Married man?

A. Yes, sir.

Q. And where do you live?

A. In St. Louis, on Gravois, 4648.

Q. And where do you work?

A. At the Atlas Portland Cement Company.

Q. How long have you worked for the Atlas Portland Cement Company?

A. Almost five years.

[fol. 48] Q. Were you working for the Atlas Portland Cement Company at the time this collision occurred, September 2nd or 3rd, 1927?

A. Yes, sir.

Q. And what was your position then with the Company?

A. In the technical department.

Q. In what?

A. In the technical department.

Q. And what particular occupation did you have in the technical department?

A. Investigating complaints, writing letters on technical subjects, and doing promotion work on special cement.

Q. Had you equipped yourself with particular schooling for that position?

A. Yes, sir.

Q. What school did you graduate from?

A. Iowa State College at Ames, Iowa.

Q. And did you get a degree in engineering?

A. Yes, sir. I am a chemical engineer.

Q. Now, at the time this accident occurred, I believe you were a passenger on the Southern Railway train that was coming from Louisville, Kentucky to St. Louis, Missouri, were you?

A. Yes, sir.

Q. And were necessarily in a sleeper, were you?

A. Yes.

Q. And I suppose you were in a lower?

A. Yes, sir.

Q. Now, you had bought your passage at Louisville from the Southern Railway Company, is that true?

A. Yes, sir.

Q. This collision occurred, if statements here are correct, some place around 1:30 in the morning of September 3, 1927, is that true?

A. Yes, sir.

Q. So that when you left Louisville, it would be about nine o'clock the evening before, is that true?

A. About, almost ten.

Q. Almost ten o'clock. It is alleged here that the collision occurred some place a short distance from Princeton, in the State of Indiana, is that true?

A. Yes, sir.

Q. What was the first that you knew of the fact that there had been a collision or anything unusual had happened?

A. The first thing that I knew that something was wrong, I feit that I was just being hurled through space, and then [fol. 49] there was a crash and everything was black for the time being. Then when I came to, I found I was lying in the hall of the car, and I had a terrific pain in my back, about my hips or small of my back, and just as bad a pain at the rear of my head.

Q. Now, after you came to, as you say, you appreciated the fact, I persume, that something was wrong?

A. Yes, sir.

Q. And what did you next observe, as far as the effects upon yourself and other passengers there?

A. There was a terrible commotion in the car; there was people crying out, and there was children in there that were screaming; there was a little girl right alongside of

me, and I helped her up; all the time, my back seemed to be getting worse, and I got back up, sat down on my berth to rest my back and kind of collect my thoughts.

Q. Did you later get outside of your own particular coach there, together with other passengers?

A. Yes, sir. I was almost the last one to leave. I saw everybody was leaving, and I got out to see what it was all about.

Q. And at that time, I suppose you discovered that there had been a collision between the Southern and another engine on another track, is that it?

A. I saw that there had been an awful bad collision.

Q. Did you get any attention there that evening from any doctor?

A. Yes; some doctor for the railroad, I imagine.

Q. And after getting attention, did the passengers proceed, after some delay, on to their destination, St. Louis?

A. Yes, sir.

Q. What time did you get to St. Louis?

A. In the afternoon, around one or two o'clock; I am not sure.

Q. The regular time for arrival at St. Louis would have been early in the morning, around seven o'clock or seven-thirty, would it?

A. Yes, sir.

Q. So that the train was delayed some five or six hours?

A. Yes, sir.

Q. In going from the station, what station did you go from, Union Station?

A. Union Station, yes.

Q. And how did you go from there to your home?

[fol. 50] A. In a taxi.

Q. And upon getting home, did you call a physician?

A. My wife did.

Q. Called Doctor Backlar?

A. Yes, sir, in South Hampton.

Q. How long were you confined, from that time on, to your bed, immediately after the acident?

A. Eight weeks.

Q. During that entire eight weeks, were you in bed?

A. Yes.

Q. After getting out of bed, after a lapse of eight weeks, did you then begin going to a doctor?

A. Yes, sir; right across the street.

Q. Dr. Blacklar, he was right across the street?

A. Yes, sir.

Q. Did you go alone, or were you assisted?

A. No, I couldn't. I went with my wife. My wife took me over.

Q. Do you recall suffering at that time, during that period of time?

A. In the small of my back, across my hips, down my legs, both legs, particularly in my right leg, and in my head, right at the small of my head, the pain started, and all through my neck, and over this whole half of my head, it just felt like somebody had a clamp or something and was just screwing down on it all the time.

Q. On what side of your head?

A. On the right side, sir.

Q. Did I ask your age?

A. Twenty-eight years of age.

Q. Twenty-eight. Had you been in good health before this accident, in all respects?

A. Yes, sir.

Q. Nerves in good condition, and health generally in good condition?

A. Yes, sir.

Q. Back in good condition?

A. Yes, sir.

Q. What did Doctor Backlar do, by way of doctoring the back, what was the first kind of treatment that he administered?

A. The first thing he did was to check me up very thoroughly. Then he gave me stuff to rub on my back, or would have my wife rub it, with alcohol rubs down my legs and up [fol. 51] into my shoulders and my neck, and she had to do that four or five times a day.

Q. How long did she have to do that for four or five times a day?

A. All the time that I was in bed.

Q. Then after you got out, did he tape your back again?

A. Never was taken off permanently.

Q. Never was taken off permanently?

A. No.

Q. Then I think here some ten or twelve weeks ago he prescribed a brace for you?

A. He really prescribed that brace ten months ago, but I kept putting it off, hoping that the tape would serve the purpose, but finally I got a brace.

Q. That brace that you wear, do you wear it night and day?

A. Yes, sir.

Q. Do you ever take it off, for the purpose of determining whether or not you can do without it?

A. Yes, sir.

Q. What is the effect it has upon your anatomy when you take the brace off?

A. My back begins hurting very badly, and my legs.

Q. Now, after the first eight weeks, you said you were in bed, and then you started going over to the doctor across the street. How long was it before you went back to work at all?

A. The whole time was from September 2nd to November 21st; about four weeks after that.

Q. Then when you went back, did you go to doing full time work, or part time?

A. No, sir. I only went down about an hour a day.

Q. Have you never been able, since that time, to do all the duties that you did before this accident?

A. No, sir.

Q. Do you still have to go home during the day, or any considerable period during the week?

A. Yes, sir; I go home in the afternoons, and some mornings, when my head and back hurt me very badly, I don't go down until late.

Q. When you were required to go traveling, after the accident, did you go alone, or have your wife go with you?

A. No, sir. My wife went with me on all my trips.

Q. Was that something that was different than it was before?

A. Yes. She never went on any of those business trips before.

[fol. 52] Q. With reference to your nervous symptoms, do you suffer headaches?

A. Extreme headaches, sir.

Q. Are they something that are intermittent, or are they constant?

A. No, sir; never stopped having headaches since I was injured.

Q. Does it disturb or affect your rest?

A. Yes, sir. I don't sleep very good at all.

Q. How about your ability to coordinate or concentracte in your work during the day, do you find any difference in that?

A. Yes, sir.

Q. What is the difference?

A. I will state that my work is highly technical work, and it requires considerable thought in the solution of some of my problems, and I will start out on a problem, try to read a given material about a complaint, and before I get through, why I cannot thing a thing—it just—I cannot concentrate.

Q. Do you get dizzy spells during the day?

A. Yes, sir.

Q. Is that something that occurs frequently, or not?

A. Yes, almost every day, particularly when I go out at noon to lunch, all noise down on the streets.

Q. You permitted the Southern Railway Company to examine you, I believe, on three occasions?

A. Yes, sir.

Q. You permitted their Doctor Clopton to examine you?

A. Yes, sir.

Q. Permitted their Doctor Leighton to examine you?

A. Yes, sir.

Q. Their Doctor Fischel to examine you?

A. Yes, sir.

Q. Permitted their Doctor Ernst to take X-ray pictures of you?

A. Yes, sir.

Q. As a matter of record, was the examination of Doctor Clopton and Doctor Fischel at the same time?

A. Yes, sir.

Q. Was Doctor Clopton there during the entire period of the examination?

A. No, sir.

Q. Did Doctor Clopton ever palpate or press or look at your back at all, in making the examination?

A. No, sir.

[fol. 53] Q. The one who actually did the examining at that time was Doctor Fischel?

A. Yes, sir.

Q. And he examined you thoroughly?

A. Yes, sir; and he took the history before Doctor Clopton even came in.

Q. In other words, the history was down before Doctor Clopton came in, and the examination, a portion of it, was made before he got there?

A. Yes, sir.

Q. Did Doctor Clopton ever even so much as lay his hands on you?

A. Not that I can remember.

Q. Was there a period of time immediately after this accident, I mean while at home, that you were delirious for a number of days, or not?

A. Yes, sir, four or five days after the accident, at times, not all day long.

Mr. Eagleton: That is all.

Cross-examination.

By Mr. Houts:

Q. Where was your home, Mr. Hussey?

A. St. Louis.

Q. Before you came to St. Louis?

A. New York City.

Q. Did you go from there to Iowa State?

A. No. I went from Iowa State to Chicago, and from Chicago to Dayton.

Q. No—I mean when you first went to school, did you live in Iowa?

A. No, sir. My home was in Georgia. I was born and raised in Georgia.

Q. You were born and raised in Georgia?

A. Yes, sir.

Q. And where were you living when you went to Ames?

A. In Ames.

Q. You were living in Ames?

A. Yes.

Q. How old were you then?

A. Twenty years old.

Q. Were you employed there at that time?

A. No, sir. I went there to go to school.

Q. That is what I asked you?

A. Yes, sir.

Q. You went there to go to school?

[fol. 54] A. Yes, sir.

Q. I say, where were you living at the time you went to Ames, to go to school?

A. Oh, in the Canal Zone, down in Panama.

Q. Down in Panama?

A. Yes, sir.

Q. What service?

A. In the Government service.

Q. In what capacity?

A. As a file clerk.

Q. File clerk?

A. File clerk, yes, sir.

Q. And from there you went to Ames and entered Ames?

A. Not directly from there to Ames. I went from there to Memphis, Tennessee.

Q. What were you employed as?

A. As a bill clerk.

Q. For what Company?

A. The Rickman-Crosby Company.

Q. And then did you go from Memphis to Ames?

A. Yes, sir.

Q. For the purpose of entering school?

A. Yes.

Q. And you spent four years there?

A. Yes, sir.

Q. And graduated?

A. Yes, sir.

Q. Did you take any part in athletics?

A. No, sir. I couldn't. I worked my way through college.

Q. You did not then take any part in athletics?

A. No, sir.

Q. What do you weigh, Mr. Hussey?

A. One hundred, thirty-eight, I believe, with my clothes on.

Q. With you clothes on?

A. Yes, sir.

Q. Did you ever weigh any more than that?

A. Yes, when I was in the army.

Q. How much did you weigh in the army?

A. One hundred, forty-two.

Q. Well, since your accident, you have not lost any weight, have you?

A. No, sir. Since the accident?

Q. Yes?

A. Yes, sir.

[fol. 55] Q. Well, you say you weigh 138. The best you ever weighed was 142. Now, how much have you lost?

A. Well, I don't—I have gained that back.

Q. How is that?

A. I have gained that back. Immediately after the accident, I lost twelve pounds.

Q. Oh, you lost twelve pounds?

A. Yes, sir.

Q. And you have gained that back?

A. Yes, sir; but no more.

Q. And a little more?

A. But no more.

Q. But no more. Your office work, or your work is all office work?

A. Yes, sir.

Q. Do you travel quite a good deal?

A. Yes, sir.

Q. In a general way, where do you travel?

A. Over twenty-three states.

Q. Over twenty-three states.

A. From Florida to Minnesota, and west to—

Q. When were you last away?

A. Sir?

Q. When were you last away?

A. About two weeks ago.

Q. And how long were you away that time?

A. One day.

Q. Before that, where had you been?

A. Before that time?

Q. What was the last trip?

A. You say where was I?

Q. Yes. What different places have you been traveling?

A. Oh, I have been to New York.

Q. Since the accident I am talking about.

A. Since the accident, to New York, to Chicago, to Des Moines, Iowa, Mobile, Alabama, Atlanta, Georgia. That is all I recall.

Q. Were you down to Panama too?

A. Yes.

Q. Down to Panama?

A. That was not on business.

Q. That was vacation?

A. Yes, sir.

Q. Now, these various places that you have gone, you have gone, I presume, on business for your Company?

A. Yes, sir.

[fol. 56] Q. And that had to do with, you say, settling disputes, is that what that was for?

A. Yes, sir.

Q. Disputes about what?

A. No, not settling disputes, but investigating complaints.

Q. Oh, investigating complaints?

A. Yes, sir.

Q. And what would that be complaints about?

A. Cement.

Q. About cement?

A. Yes, sir.

Q. You are an expert on cement?

A. Not an expert. I know quite a bit about cement.

Q. What kind of course did you take at Ames?

A. Chemical engineering.

Q. Chemical engineering?

A. Yes, sir.

Q. Do you use that in chemical engineering with the Atlas Cement?

A. Very much so.

Q. Well then, I presume that these trips that you make are for the purpose of applying your engineering knowledge as to whatever complaints may be made about cement?

A. The trips were made to get data, to get information about them, to bring back to the office.

Q. And then when you get back to the office, do you have anything to do with them?

A. Yes, I have to discuss it with my superiors and give them all the details of the complaints.

Q. And you give your opinion as to whether or not the complaints are well founded?

A. Yes.

Q. Yes. The Company has continued you just the same after the accident as it did before, so far as your salary was concerned?

A. Yes, sir.

Q. Now, right after the accident, Mr. Hussey, you helped some of them about?

A. Just those in my course, just as I gave in my testimony, helped this little girl up.

Q. Any others that you helped?

A. No, sir.

Q. Did you get out and walk around?

A. Yes.

[fol. 57] Q. And see what caused the trouble?

A. Yes, sir.

Q. And did any of the people about there ask you whether you were hurt?

A. No.

Q. Did the doctors ask you about it?

A. The doctor asked what was bothering me, and I told him severe pain in my head and my back.

Q. That was some of the doctors that attended the wreck, wasn't it?

A. Yes, and one that was on the train.

Q. And one that was on the train at that time?

A. Yes, sir.

Q. And then you rode on into St. Louis, didn't you?

A. Yes, sir.

Q. And did you talk with anybody on the train and tell him whether you were hurt or not?

A. No, sir.

Q. Didn't you talk to Mr. Byrons on the train?

A. I talked to Mr. Byrons and gave him my name and address, and who I worked for.

Q. And didn't you tell him you did not think you were hurt?

A. I did not.

Q. You did not say that?

A. I did not.

Q. Your head was not cut, or anything like that, was it?

A. No, sir, it was not cut.

Q. I presume that you were in the usual position in your berth, in the sleeper, that is, with your head in the direction that the train was going, is that right?

A. Oh, yes, yes, sir.
Q. Your coach was the next to the last, I believe?
A. Yes, sir.
Q. About six or seven coaches on the train?
A. So I was told. I don't know for sure.
Q. Now, when you got off, you found your coach still on the track, didn't you?
A. Not entirely. The front of it was off.
Q. But it was on the rails, wasn't it?
A. No. As I can remember it, the front trucks were off.
Q. You were asleep, I presume?
A. Yes, sir.
Q. Did you have your grip in your berth with you?
A. Yes, sir; at the foot of my berth.
Q. Suit case, was it?
[fol. 58] A. No, sir. It was a bag.
Q. And I believe you stated to someone, at least, that the first you knew, the grip flew up and hit you, didn't you?
A. Not that I know of.
Q. How is that?
A. Not that I know of.
Q. Didn't you recite it that way to someone?
A. No, sir.
Q. Tell someone that the first you knew, the grip flew up and hit you?
A. Not that I recall.

Redirect examination.

By Mr. Eagleton:

Q. Would you mind showing the Court and the jury that brace that you wear—could you show that conveniently?

(The witness displays the brace.)

Can you Gentlemen (addressing the jury), see that?
Can you see it, the end juror there? Can you see that, please?

Q. It comes around in front, does it, and hooks around there?
A. Yes.

Mr. Eagleton: Can Your Honor see that?
The Court: Yes.
Mr. Eagleton: That is all.

FRANK J. SELLINGER, JR., a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiff, as follows:

Direct examination.

By Mr. Eagleton:

Q. What is your full name, please, sir?

A. Frank J. Sellinger, Jr.

Q. And what is your business or profession?

A. Selling cement.

Q. You are with the Atlas Portland Cement Company?

A. Yes, sir.

Q. That is the company that employs Mr. Hussey, the plaintiff in this case?

A. Yes, sir.

Q. Is your work associated with him, with his work, over there?

[fol. 59] A. Yes. I am assistant western sales manager and office manager in this office.

Q. Where is your office, please?

A. Over at the Ambassador Building.

Q. Have you had occasion to observe him and his work, both before this accident and after this accident?

A. Absolutely.

Q. Can you tell the jury the difference that you note in his apparent ability to perform this work, before and since?

A. Well, it was quite noticeable that when he came back, after the accident, he was not the same man.

Q. What did you notice since coming back, as far as his work or the results of his work or anything of that kind?

A. Well, he has lost a great deal of time, off and on, complained of headaches, dizziness, and it has been necessary for us to bring another man in to do part of the work that he used to do.

Q. I believe your Company, as Mr. Houts suggested a while ago—your Company was kind enough to pay him his salary while he was away?

A. We did, because of his previous experience, and the fact that he was on duty when he was hurt, and we felt it was the right thing to do.

Q. Do you notice down—to go right down to the present moment—do you notice that his work is different and more inefficient than before?

A. I think so.

Q. And as to his manner of getting about, his lack of alertness, or compared with his former self, do you notice that?

A. It has been remarked generally around the office.

Mr. Houts: Well, wait a minute.

Mr. Eagleton: Well now, not whether it was remarked generally around the office.

The Court: Sustained.

Q. Do you notice a difference in his manner of getting about, and his lack of alertness, as compared with his former self?

A. I do.

Mr. Eagleton: That is all. You dont care to examine?

Mr. Houts: No.

Mr. Eagleton: That is all. The plaintiff will rest, if the Court please.

The Plaintiff rests.

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[fol. 60] And thereupon the defendant, to sustain the issues in its behalf, offered and introduced the following evidence:

William E. Leighton, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. Doctor, will you state your name to the jury?

A. William E. Leighton.

Q. What is your profession?

A. Surgeon.

Q. How long have you practiced medicine or surgery?

A. Since 1900.

Q. At what institution did you secure your medical education?

A. Harvard Medical School.

Q. And you have been practicing ever since?

A. Yes, sir.

Q. You live here in St. Louis?

A. Yes.

Q. Now, what positions do you hold, Doctor Leighton?

A. I am professor of surgery at St. Louis University; I am on the visiting staff at St. Mary's Hospital, Mullanphy Hospital, Barnard Skin & Cancer Hospital, and I am consulting surgeon at the United States Veterans Bureau Hospital.

Q. And Doctor, did you make an examination of Mr. Hussey, the gentleman who has just testified?

A. Yes.

Q. Do you remember when it was.

A. On September 28, 1927, I examined him.

Q. Where was this examination made?

A. In Doctor Backlar's office.

Q. Mr. Hussey was over at Doctor Backlar's office, then?

A. Yes, sir.

Q. And that was September 28th?

A. 1927.

Q. 1927. Well, you are sure it was over there, and it was not at home, in his bed?

A. No sir. It was at Doctor Backlar's office.

Q. I understood him to say that he did not leave his bed until eight weeks after this injury, and that is the reason I want to make sure as to where you made this examination. This was Doctor Backlar's office?

A. Yes, sir.

Q. Did he come over unattended?

A. I am not sure about that. He was in the office when I got there.

Q. Was anybody else there, except him and Doctor Backlar?

A. That is all that I recall.

[fol. 61] Q. Now, what did you do, in order to make your examination, just what kind of an examination did you make, Doctor?

A. Well, I got the history of the injury which the man received, and with the consultation with the Doctor, I understood there was a question of some [*final*] injury or some head injury, and therefore I made what is known as a neurological examination, to find out if there was any disturbance of function of the brain or the spinal cord.

Q. Now, how did you go about making such an examination?

A. Well, we test the various nerves, for instance, in the head there are twelve cranial nerves, and one controls the eye; we test the reaction of the eye as to whether there is any limitation of motion, the reaction of the pupils to light and accommodation, that is, as to contraction or relaxation of the pupil, and then we test out—then I tested out the motor—a sensory function of the extremities, to find out if there was any impairment of motion.

Q. You mean the feet and the hands?

A. The feet, hands, arms, legs and so on.

Q. Yes.

A. And also the abdominal muscles, and also I tested out the sensory reflexes.

Q. What are those?

A. That is the reaction of the skin to stimuli, such as pricking it with a pin or using a wisp of cotton, to see if he has all his sensibilities intact.

Q. Well now, just tell the jury what you found?

A. This examination was negative, as far as any disturbance of the function of the nerves of the brain or the spinal cord. I was unable to find any impairment of motion; I was unable to find any impairment of his sensibilities, and the reactions to all these stimuli were perfectly within normal limits. He had—he complained of tender points over the sacrum, low down, that is the part of the bone that joins to the end of the spinal column.

Q. Yes.

A. And he complained of tenderness down his right leg. Other than that, I was unable to make out anything.

Q. Well, that is what he said about it. You could not discover it. Is that your understanding?

A. I cannot discover pain. I can only—that is a subjective rather than an objective symptom, and he complained of these tender points when I touched them.

Q. Now, you say Doctor Backlar was there all the time that you made this examination?

A. Yes, sir.

[fol. 62] Q. And did Doctor Backlar see you make these various tests?

A. Yes, sir.

Q. And did he see the results of these various tests that you made?

A. I gave him the report and talked the thing over with him, I am sure, at the time.

Q. Yes. Well, could you discover anything that would, so far as you were able to judge, that would cause the headaches or cause any impairment in the use of any of his—and of the parts of his body—anything that you could see?

A. Anything that I could see or feel, I could not say that he was suffering from pain, or headaches, or anything of that sort.

Q. Did he look then about like he looks today?

A. Well, I have not seen him since that time.

Q. I see. Now, at that time, that you examined him, did Doctor Backlar exhibit to you some X-ray pictures that he said he had taken of Mr. Hussey?

A. Yes, sir.

Q. Did you examine those X-ray pictures?

A. Yes, sir.

Q. From the X-ray pictures, could you discover anything abnormal or out of line?

A. They did not appear abnormal to me.

Q. Well, did you examine the picture of the vertebræ of the spinal column.

A. Yes, sir.

Q. Could you find anything wrong with that?

A. No, sir.

Q. Doctor, did you ever make any other than this one examination?

A. No, sir.

Mr. Houts: I think that is all, Mr. Eagleton.

Cross-examination.

By Mr. Eagleton:

Q. Doctor, with reference to this man being at Doctor Backlar's office, I believe you reported, did you not, that we brought him over there, as an accommodation, to permit you to make the examination with proper facilities, isn't that right?

A. I believe they told me he had been in bed up to that time. According to his story, he had been at Doctor Backlar's office a week after his injury, and then he came up

there again on the 26th of September, and that he then came on the 28th, for my convenience, to examine him. How he got there, I don't know.

Q. Well now, what I am getting at is this: it was your information that he came there after his injury on one express occasion, to permit Doctor Backlar to take an X-ray picture, isn't that it—that is what you reported?

[fol. 63] A. I think that was it.

Q. Yes, and then the next time he came for a particular purpose to the Doctor's office, and then the third time, to permit you to examine him, wasn't that the way you understood it?

A. I believe.

Q. And otherwise was in bed?

A. My history——

Q. Now, I say, with reference to this examination, you were making it at the request of the claim agent of the Southern Railway Company, were you not?

A. I think.

Q. Mr. Byrons?

A. I think Mr. Byrons called me and asked me to make an examination, yes.

Q. And that is the gentleman to whom you reported—Mr. Byrons?

A. Yes.

Q. With reference to X-rays, they don't show anything that may be wrong with muscles or ligaments or tendons or nerves, or what you doctors call soft structure, do they—they don't begin to show damage to those parts?

A. Not as a rule.

Q. So when you take an X-ray of this man's skull, it does not show and cannot show, by the nature of it, any inflammation of the brain, can it?

A. No.

Q. And if you take an X-ray of his spine, it simply shows the contour of the spine and the normal presence of the vertebræ, but does not show damage, if there be damage, to the soft structures, does it?

A. No.

Q. Doctor, you reported, did you not, after you had concluded your examination, that you honestly believed that

that man at that time was suffering from reaction and shock, due to the accident, did you not?

A. I think so.

Q. Yes, and that was your opinion at the time?

A. Yes, sir.

Q. And you only examined him the one time.

A. Yes, sir.

Mr. Eagleton: That is all.

Mr. Houts: That is all, Doctor.

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WALTER FISCHEL, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. Doctor, will you please state your name to the jury?

A. Walter Fischel.

[fol. 64] Q. And your profession, Doctor?

A. Practice of medicine.

Q. You live here in St. Louis, I believe?

A. Yes, sir.

Q. How long have you practiced medicine here?

A. Some twenty-three years.

Q. What institution are you a graduate of, Doctor?

A. Washington University, Medical Department.

Q. What positions, if any, do you have in connection with the practice of medicine?

A. I have a teaching position in the Washington University Medical School. I am on the staff of a number of hospitals here in St. Louis.

Q. Would you mention some of the hospitals, please?

A. St. Lukes Hospital, Barnes Hospital, City Hospital.

Q. Doctor, I believe you examined Mr. Hussey, the plaintiff in this suit?

A. I did.

Q. Do you remember when that was?

A. On April 13, 1928.

Q. Who was present at the time you made your examination?

A. Mr. Hussey came into my office, and during part of the time he and I were alone; other times, Doctor Malvern Clopton came into the office also, to examine him, and my assistant was present during part of the time.

Q. Mr. Hussey came there unattended, I understood you to say?

A. Yes.

Q. Now, you examined him at that time, Doctor, as I understand it, for the purpose of ascertaining what injuries he actually had at that time. You knew that he had this suit pending, didn't you?

A. Yes.

Q. That arrangement was made by whom—the arrangement for the examination was made by whom?

A. Mr. McPheeters wrote and asked if it would be possible for me to make an examination of Mr. Hussey, which he informed me was done on consent of Mr. Hussey's lawyers, and that I was to send my report to both of them, the same report.

Q. Yes. After examination, you made a report, both to Mr. McPheeters and also to Mr. Hussey's lawyers?

A. To Mr. Barrett.

Q. Yes. That is Mr. Jesse Barrett. And that is the report—one copy was sent to——

A. Mr. McPheeters.

Q. And the other was sent to Attorney General Barrett?

A. Yes.

[fol. 65] Q. And you understood at that time that you were examining him by consent of both Mr. McPheeters and Attorney General Barrett?

A. So Mr. McPheeters stated in the letter.

Q. Well now, just tell the jury, Doctor, what you did in the way of making an examination of him?

A. Well, I asked Mr. Hussey, after he had stated in a general way what had happened to him, in what ways he felt badly, and I asked him to step into my examining room, where I had him remove all of his clothes, and I then examined him as thoroughly as I knew how, from head to foot, to see if I could find outward evidence or signs, as we call them, of any disease or abnormality which I could tell by examination.

Q. Well, just tell just what things you did and what the reactions were to what you did?

A. Well, I first examined him very carefully, all over, for any evident deformities, any change in his position of standing, any change in his method of walking, any change in his movements. I then examined his skin very carefully, to see if there were any evidences of scars. I examined then the movements; first, I had asked him to move about and to make certain movements, and then I made what we call passive movements, that is, I moved his arms and legs, neck, back, to see whether I could find any evidence of abnormal function or immobility. I tested out his reflexes, as we call them, that is, by stimulating certain nerve trunks, seeing the reaction of muscles. I tested his sensation by pin prick, by means of cotton swath, by the sensation of whether he knew what parts of his body were being touched; in other words, to see whether I could detect any evidence of abnormal nerve function. I then, after I had completed these examinations, I made a routine, general medical examination, to see if there was any evidence of any disease of any of his internal organs. Examined his urine to see if there was any evidence of injury of disease of his kidneys. I then—during part of this examination, Doctor Clopton was also in the room and made similar tests.

Q. Did you see Doctor Clopton when he made his tests, too?

A. Yes. And we then asked Mr. Hussey if he would mind having some X-Ray pictures taken for us, which he said he had no objection to, and we had those X-Ray pictures taken.

Q. Whom were they taken by?

[fol. 66] A. By Doctors Ernst and Muench, who have offices in the Beaumont Building.

Q. Well, now just tell the jury then—you have described to them how you went about trying to find out everything that was the matter with him, that you could detect—now just tell the jury what the results were, and your conclusions, when you got through?

A. The result of my examinations was, I could find no outward evidence or signs of injury or disease affecting the function of his nervous system, as evidenced by impairment of that function, that I could see, myself. I could find no evidence of disease or injury to any of his internal organs. The only evidence I could see came from his own statements,

which I would not call objective evidence. I afterwards examined the X-ray pictures which were taken, and to the best of my ability and knowledge, I could detect no evidence of there having been injury to the bones of his skull or to the vertebrae which composed his spinal column.

Q. Did he seem to have a normal movement of the legs and arms and eyes and everything that you examined?

A. He did.

Q. And now, when you lightly brushed him in places with the cotton, as you have told about, did he feel it just the same as a normal man would feel it?

A. Yes.

Q. As far as you could tell?

A. There was no deviation from the normal, that I could detect.

Q. And aside from what he told you he thought his troubles were, you could not find anything the matter with him, is that right?

A. There was no objective evidence.

Q. Well, Doctor, is it a fact that people who may have been in a wreck or upset, or something of that kind, get it on their mind, there is something the matter with them, when there really is not—is that true, from a medical standpoint?

A. I think it is true of all states, that people get things in their mind.

Q. When it is purely mental, not really any foundation for it, is that right?

A. That may be right, yes; often so.

Q. Have you had many illustrations of that in your practice?

A. Yes, a great many.

[fol. 67] Q. I think that is all. Oh, wait a minute. One thing: now, you and Doctor Clopton, did you confer again after you completed your examination?

A. Yes; we asked each other if either one had noticed anything which the other had not.

Q. Was his conclusion identical with yours?

Mr. Eagleton: I object to that.

Mr. Houts: All right. I will not ask that.

A. I cannot answer that question.

Mr. Houts: All right.

Cross-examination.

By Mr. Eagleton:

Q. Doctor, you were making this examination at the request of Mr. McPheeters, who is the gentleman who sits now back of Mr. Houts here at the board (indicating)?

A. I was.

Q. And he is the attorney for the Southern Railway, you know that, as a matter of fact?

A. He stated that.

Q. And you have made similar examinations for him, on other cases, have you not?

A. A few.

Q. And on each of those other cases that he wants a so-called disinterested opinion, he calls you and Doctor Clopton to sit as a board, calls the same two each time?

A. No, I don't think so.

Q. On the other cases, didn't you sit in consert with Doctor Clopton?

A. I, at this moment, could only recall but one other case where I have ever been associated with Doctor Clopton.

Q. I see, and that was for Mr. McPheeters?

A. I am not even sure of that.

Q. Well, you remember the case of Cune against Southern Railway Company, a man damaged after the Southern had a wreck somewhere in the United States and injured a man by the name of Cune, and you and Doctor Clopton sat as the board on that, did you not, medical board, do you remember that?

A. I remember. I couldn't, until you mentioned it, recall the name of the case.

Q. Doctor, in this case, you reported, amongst other things, that in your opinion, Mr. Hussey, at the present time—meaning the time of your examination—was suffering [fol. 68] with a strain of some of the muscles and ligaments of his back and neck, did you not?

A. Is that my words, my report?

Q. Well, if that is in there—I think it is the words of it, as near as I can recall it—it says, in view of my findings of our examination, I would give it as my opinion that Mr. Hussey at present complains of the symptoms which would indicate that he had suffered from strain of some of the

ligaments and muscles of the back and neck, is that correct?

A. That is correct.

Q. In other words, he cooperated with you fully in the examination, did he not?

A. Absolutely.

Q. He did not attempt to hide or conceal or do a single thing that you thought was important for proper examination, did he?

A. He did not.

Q. And when you suggested that X-rays be taken, in the hope of shedding light on his condition, he readily accepted that condition?

A. He did.

Q. And it was your honest opinion, after he had gotten all through, that he was suffering with severe strain of the muscles and ligaments, and that it would take some time to recover—was it not?

A. As you just quoted it, he had been suffering from a severe strain of his ligaments and muscles.

Q. Yes. That was after, of course, you made the examination—that was your conclusion?

A. Yes.

Q. And is given as your conclusion, is it not?

A. Basing that on my examination and, to a certain extent, believing in what he told me he had suffered.

Q. In other words, you felt that the man was not malingering, and believed he was honest, did you not?

A. Absolutely.

Q. A strain of the muscle, Doctor, what happens when a muscle is strained, what are the physical attributes of a strain of the muscle?

A. Well, it varies tremendously in extent. It may be to the extent of tearing apart some of the fibres, or it may be to the extent of causing a little hemorrhage into the fibres, which causes, just as we see, a bruise of the skin, causes a somewhat similar condition in the muscle.

Q. Doctor, it is not unusual for you, in your experience as a doctor, to find many cases where persons actually do [fol. 69] suffer, in your judgment, with severe pain, where there are no objective signs of injury, isn't that true?

A. Yes.

Mr. Eagleton: I believe that is all.

Redirect examination.

By. Mr. Houts:

Q. Doctor, Mr. Eagleton asked you about another case that you made examination in, with Doctor Clopton. What was the name of that plaintiff, Mr. Eagleton?

Mr. Eagleton: A man by the name of Cune.

Q. Cune. Mr. Eagleton was the attorney in that case, too, wasn't he?

A. I could not swear to that. My memory is not good enough.

Q. That was made by Mr. Eagleton's consent also, wasn't it?

A. I presume it was made by somebody's consent. I don't know.

Mr. Houts: That is all, Doctor.

Mr. Eagleton: That is all, Doctor.

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HERBERT E. MUENCH, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. Doctor, will you please state your name to the jury?

A. Herbert E. Muench.

Q. With whom are you associated in business?

A. Doctor Ernst—Edwin C. Ernst.

Q. And what is your profession?

A. X-ray specialist.

Q. You are an X-ray specialist, and that is true also of Doctor Ernst?

A. Yes, sir.

Q. How long have you been specializing in X-ray work?

A. About fourteen years.

Q. Does your profession require you to be—to know all about the bones and fractures, and things of that kind?

A. That is the principal portion of our work.

Q. And your work is done principally, I presume, for doctors, is that it?

A. Yes, sir.

Q. Now, did you make an X-ray examination of Mr. Hussey, the plaintiff in this suit?

A. Yes.

[fol. 70] Q. When did you do that, Doctor Muench?

A. I will have to recall the exact date here. (The witness refers to some X-ray films.) On March 13, 1928.

Q. Where was that made?

A. I mean—I beg your pardon—I made a mistake here on the month. It was April.

Q. It was April?

A. Yes.

Q. Where was that examination made?

A. At the Beaumont Medical Building, in our offices there.

Q. How many X-ray pictures did you take of Mr. Hussey at that time?

A. Well, there were stereoscopic views of both sides of the skull, with anterior-posterior, and posterior-anterior pictures of the skull, and then pictures of the spine, cervical spine, and the lumbar spine.

Q. That is, you took pictures from the back of his skull to the back of the spine, and also from the front, so as to get the complete picture of the skull and of the spine?

A. Yes.

Q. Now, what did you find, if anything, about the skull?

A. There was nothing found in the skull to indicate a bone injury, as far as we could determine, to be found.

Q. Yes. What about the spinal column?

A. The spinal column was also negative of any findings.

Q. Did you particularly examine the lumbar vertebrae?

A. Yes.

Q. At that time, what did you find the condition of the spinal column in that region?

A. I want to take one more look here at this spinal picture (indicating). The articulation of the lumbar vertebrae and sacro-iliac joint appeared normal, and there were no evidences of fractures or other bone injury.

Q. To any part of the spinal column?

A. No, sir.

Mr. Houts: That is all I want to ask.

Cross-examination.

By Mr. Eagleton:

Q. Is it correct—are you a doctor?

A. I am a doctor of dentistry, and I have several other degrees that entitle me to doctor.

Q. You are not a doctor of medicine?

A. I am not a doctor of medicine. Unfortunately, I could not complete my course of study entirely.

Q. I just wanted to get that correct, because I had understood from you before that that was correct.

A. That is correct.

Q. I did not want to embarrass you, and I am not trying to embarrass you. I admit your qualifications as an X-ray [fol. 71] specialist. Doctor Muench, the X-rays that you took were taken for the purpose of showing bone pathology, if there was any, that is true, is it not?

A. Yes, sir.

Q. And reiterating a little bit, I want to make it clear that it would not show any inflammation to the brain, it would not show any straining or tearing or damage to the muscles or ligaments of the spine, would it?

A. No.

Q. In other words, if such were present, the X-ray would be of no avail for these purposes?

A. No.

Q. That is true, isn't it?

A. Yes.

Mr. Eagleton: That is all.

Mr. Houts: That is all, Doctor.

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Wilbur K. Mueller, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. Doctor, please state your name to the jury?

A. Wilbur K. Mueller.

Q. What is your profession, Doctor?

A. Physician.

Q. How long have you—or do you practice medicine?

A. Yes, sir.

Q. How long have you practiced medicine?

A. Since 1925.

Q. In connection with your practice of medicine, do you also study X-ray pictures and take X-ray pictures?

A. Yes, sir, I do that exclusively.

Q. You do that exclusively?

A. Yes, sir.

Q. Did you take a picture or pictures of Mr. Hussey, the plaintiff in this case?

A. They were taken with my girl, either she or I taking them; I was present when they were taken.

Q. You were present when they were taken?

A. Yes, sir.

Q. Do you know the date you took those?

A. They were taken on November 17th, 1927.

Q. Where were those pictures taken?

A. Taken at our laboratory, in the University Club Building.

Q. On November 17th?

A. 1927.

Q. Did Mr. Hussey come there to have his pictures taken?

A. Yes, sir.

[fol. 72] Q. Was he attended when he came, or did he come alone?

A. I don't recall that. I believe someone came with him, but I am not sure.

Q. I see. Well, now, you did take pictures then of him, did you?

A. Yes, sir.

Q. What parts of his body did you take pictures of?

A. I took stereoscopic pictures of the lumbar spine, sacrum, and sacro-iliac joints.

Q. Did you take any of the skull, at all?

A. No, sir.

Q. Now, you have those pictures, I presume?

A. Yes, sir.

Q. Just tell the jury whether you found anything in the pictures that evidenced any fracture or dislocation, or anything of that kind, of the spine or of the sacro-iliac joint.

A. No. We found no evidence of injury to the spine or sacro-iliac joints.

Q. The spinal column seemed to be normal, did it?

A. Yes. There was one little abnormality from birth rather—not from injury, though.

Q. You say there was something there that indicated a birth malformation?

A. Yes, following birth.

Q. But you say that that was not something that happened from injury?

A. No, it is not an injury.

Q. Well, where was that malformation?

A. The left transverse process of the first lumber vertebra.

Q. That is up in the small of the back here (indicating), is it?

A. Yes, it is high up.

Q. High up?

A. High up in the small of the back, I mean; that is about there (indicating).

Q. Yes; and you say that your picture showed nothing the matter with the sacro-iliac joint?

A. They were normal.

Q. That was which sacro-iliac joint?

A. Both of them.

Q. Both of them. That is all.

Mr. Eagleton: That is all.

Mr. Houts: I want to say to Mr. Eagleton, Your Honor and the jury, that Doctor Clopton is not available, and I may want to put him on tomorrow, if he comes back. He has [—] out of City.

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Robert E. Hughes, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

[fol. 73] Direct examination.

By Mr. Houts:

Q. State your name to the jury, please.

A. Robert E. Hughes.

Q. Where do you live, Mr. Hughes?
A. In Petersburg, Indiana.
Q. What is your business?
A. Railroad conductor, brakeman.
Q. For what railroad?
A. E. I. & T. H.
Q. That is the Evansville, Indiana and Terre Haute Railroad Company?
A. Evansville, Indiana and Terre Haute Railroad Company, yes, sir.
Q. Did you have that same position in September of last year, at the time this wreck occurred, at Mine Junction?
A. Yes, sir.
Q. Now, at what point was it that this wreck occurred?
A. You mean what part of the track?
Q. Yes—what point on the line?
A. Well, at Mine Switch, Francisco.
Q. That is near Francisco?
A. Yes, sir, near Frisco.
Q. And that switch is a connection between what two lines?
A. The E. I. & T. H. and the Southern Railway.
Q. And the E. I. & T. H. line runs from the point of the switch, where to?
A. Back to the mine.
Q. Back to the mine?
A. Yes, sir.
Q. A distance of how far?
A. Well, I don't know. I would judge about three quarters of a mile back to the mine; probably more.
Q. Yes. How long before that time had you been working over that switch?
A. Well, I had been working over it for about five years, all told. I was on the north end before that.
Q. Yes. And where does the E. I. & T. H. operate its trains—where do the E. I. & T. H. trains operate, after they leave that switch, where do they go to?
A. Oakland City.
Q. Oakland City?
A. Yes, sir.
Q. Is that east or west?
A. That is east of Frisco.

Q. That is east of the switch?

A. Yes, sir.

Q. A distance of about how far?

A. I would judge it is about six-mile- or seven.

Q. And there does it connect with the—?

A. The E. I. & T. H.

[fol. 74] Q. The E. I. & T. H.?

A. Yes, sir.

Q. And you operated your trains then over the Southern tracks?

A. Yes, sir.

Q. Between the switch and the other connection of the E. I. & T. H.?

A. Yes.

Q. Now, on the night of September 2nd, of last year, who was in your crew?

A. Brakeman Carson and Brakeman Stanley.

Q. Who was the engineer and fireman?

A. Engineer Fluher and Fireman Anderson.

Q. The train that you were working on that night, what time did you come over from Oakland City?

A. You mean to Francisco, the first time?

Q. Yes.

A. I really don't remember, but it was around nine o'-clock, I believe.

Q. And did you come over for the purpose of getting coal cars off of the—from the mine?

A. Yes.

Q. Did you take those back to Oakland City?

A. We took part of them back, and could not take them all at one time, on account of the tonnage; they won't let you haul only so many over there, and we had to come back again, made two trips.

Q. You made two trips?

A. Yes, sir.

Q. How many times before this accident happened that night did you go in and out of that switch?

A. Three times.

Q. Three times?

A. Yes, sir.

Q. Now, on those occasions, when you went in and out

of that switch, whose duty was it to throw the switch, or do you remember?

A. Well, it is most generally the flag-man's duty to throw the switch when you get it in the clear, but if the conductor is handy, why he does it.

Q. I see. Now, just before the train came along that was wrecked, had any other Southern train passed there?

A. One freight train going west.

Q. A freight train going west?

A. Yes.

Q. You spoke of that as the extra, didn't you?

A. Yes, sir.

Q. About how long before the accident did that freight train go west?

A. I really don't remember now. It was about thirty or thirty-five minutes, I imagine.

Q. Something like a half hour?

A. Yes, sir; maybe a little better.

Q. After the freight train went west, what did you do toward finding out whether you could go on to Oakland City?

[fol. 75] A. I went in the telephone booth they have there, which is something like one of the closed pay stations, called the dispatcher at Preston for running orders to Oakland City.

Q. Yes, and who was present there of your crew?

A. Well, both brakemen were up there close when I called up.

Q. Yes. What did you do toward—well, what did they say when you called up?

A. Well, he gave me running orders to Oakland City and——

Q. Just go ahead and tell what took place, just how you handled that situation, so that the jury will understand it.

A. Well, he give me the running orders to Oakland City.

Q. That is, the dispatcher did?

A. Yes, sir, the dispatcher, and I told the brakeman "all right," and as soon as I told him "all right," I thought about this No. 2 passenger train, and pulled out my watch and looked at it, and saw that we did not have so awful much time, so I told the brakeman to ask the engineer if he could make Oakland City for No. 2, that is the passenger train.

Q. What brakeman was that?

A. I believe it was Carson.

Q. Carson?

A. Yes, sir. And he went and asked the engineer and came back and said no, and then I called the dispatcher again and told him we would stay there for No. 2.

Q. Well then, did you look at the signals to see how that switch was set then?

A. When I came out of the booth, I looked at the light and the target, and they both showed green.

Q. Green?

A. Yes, sir.

Q. What does that mean to a railroad man, if the target is clear, up and down the track?

A. That means a clear track.

Q. A clear track?

A. Yes, sir.

Q. And that meant go ahead?

A. Yes, sir.

Q. Then what did you do?

A. Well, I saw we was stuck there for the passenger train, I walked about fourteen or fifteen feet, maybe a little further west, to the telephone box and sat down.

Q. And sat down?

A. Yes; we would be stuck there for twenty or twenty-five minutes, anyway.

Q. Now, when the passenger train came, what happened?

A. It hit that Oakland switch.

Q. It did what?

A. It hit the switch.

Q. Took the switch?

A. Yes, sir.

Q. And when in onto your train?

[fol. 76] A. On to our train.

Q. Your train was standing how far from the switch then, would you say?

A. Well, it was on the inside of the derail; had its clearance already.

Q. How is that?

A. Had its clearance point from the main line; it was down back of the derail.

Q. About how many car lengths would you say?

A. From the point of the switch?

Q. Yes.

A. Well, I would say about three car lengths.

Q. About three car lengths. Well, of course that was a considerable wreck, then?

A. Yes, sir.

Q. What happened to the fireman and engineer on your train?

A. Well, the engineer was bruised up considerably and cut a little bit and the fireman on our train was killed.

Q. That was Anderson, wasn't it?

A. Yes, sir.

Q. He was killed. Well now then, did you go back then to see what the situation was, why that train took that siding?

A. Yes, sir.

Q. What did you observe when you got back there?

A. We found out that the throw-rod had become disconnected from the bottom of the switch staff.

Q. Do you remember how many cars there were on that Southern train?

A. Six or seven: I don't remember just which.

Q. And how many of them took the siding?

A. Well, they all started in there.

Q. Yes, I understand, but how many of them got in?

A. Well, I believe they all got in but the rear car.

Q. All but the rear car?

A. Yes, sir.

Q. Where did the rear trucks of the rear car stand after ou went back, everything had settled down, after the train stopped?

A. I believe the rear trucks were sitting right on the switch point.

Q. Right on the switch, and what was the position of the switch points, how were they set?

A. Well, they were lying to the east.

Q. That is, they were so set against the rails that it would send the Southern train into the switch?

A. Yes.

Q. And were they in that condition when you came back to look at them?

A. Yes, sir; the rear trucks, I believe it was, was setting right on the points.

[fol. 77] Q. Now, had anybody disturbed that switch between the time that the wreck occurred and the time that you went back to look at it?

A. Nobody could bother it.

Q. They could not bother it. Explain to the jury why they could not bother it.

A. Well, these trucks was sitting right on the switch points, and the switch could not have been throwed.

Q. Could not have been moved?

A. No, sir.

Q. After the wreck?

A. No, sir.

Q. So that it must have been there before the wreck, before the train came?

A. It had to be lined for the siding, or they couldn't——

Q. Now, Mr. Hughes, I want to show you a photograph that has been marked Defendant's Exhibit No. 1, and ask you if you recognize that as the switch that is involved in this case?

A. Well, it looks like the switch, but the switch there is over here (indicating).

Mr. Eagleton: Speak out, please.

Mr. Houts: Talk so the jury can hear.

The Witness: Part of the switch is missing. The switch-throw or lever and the staff is missing; I could not identify it as that switch, although there is a switch there exactly like that one.

Q. Well, I am trying to get it to the jury so that they will understand exactly just how that switch was standing.

A. It was standing like the picture shows here.

Q. At the time you went back and looked at it, was it just like that?

A. The switch was standing like that when I look- at it after the wreck.

Q. After the wreck?

A. Yes, sir.

Q. That is the right-hand points of the switch was against the——

A. Right-hand rail.

Q. Right-hand rail?

A. Yes.

Q. And the left-hand point was——

A. Open.

Q. Was open?

A. Yes, sir.

Q. And what would that do to the train—where would it send it?

A. That would send it right in the siding.

Q. Right in the siding?

A. Yes, sir.

[fol. 78] Q. There appear to be some wrecked cars there; is that part of that wreck?

A. That looks like it.

Q. Well, I want to show you, and so the jury can see it, too, a photograph that has been marked Defendant's Exhibit No. 2, which appears to be a photograph of the light, and down at the bottom, the throw-bar that connects with it.

A. Yes, sir.

Q. Does that correctly represent that situation there at that switch?

A. Yes, sir.

Q. Now, you have said to the jury that when you examined the switch after the wreck, that the throw-bar had become disconnected. Will you point on there (indicating) to the point where it was disconnected?

A. Dropped down (indicating).

Q. Right at the bottom?

A. Yes, sir.

Q. And the light is where, on this photograph—the signal lights, where are they?

A. The signal light is up here (indicating).

Q. At the top?

A. Where it is sitting now; it was lighting at the main track.

Q. Yes. That means——

A. Clear.

Q. Clear?

A. Yes, sir.

Q. And those are the lights that you say showed green up and down the Southern tracks?

A. Yes, sir.

Q. So that indicated to the engineer of the Southern train that the track was clear for him to go past?

A. Yes, sir.

Q. And you say it was that way before the train came, did you?

A. The light showed green.

Q. That is what I mean.

A. Yes, sir.

Q. And you saw it before the train came?

A. Yes, sir, I noticed it when I came out of the telephone booth.

Q. And then after the train had taken the track you looked at it again, did you?

A. Yes, sir.

Q. And it still showed green?

A. Still showed green.

Q. Just the same?

A. Yes, sir.

Q. And if it had not been connected—or disconnected, I mean—if that rod had not become disconnected, what would the proper light have been?

A. It would have shown red.

Q. Shown red?

A. Yes, sir.

[fol. 79] Q. That would have shown——

A. Danger.

Q. Danger?

A. Yes, sir.

Q. That the switch was open?

A. Yes, sir.

Mr. Houts: That is all.

Cross-examination.

By Mr. Eagleton:

Q. Mr. Hughes, to amplify the matter somewhat, the fault, as you found it, was with the signallying device, rather than with the switch itself, is that true?

A. Well, I don't know whether you would call it the signalling device or not. They were both connected together there.

Q. Yes, but in other words, the light that should have been displayed at the time was a red light?

A. That should have been displayed, yes, sir.

Q. And the reason why a red light should have been displayed is because the switch was, in fact, left open?

A. The switch was open; the red light should have been displayed, yes, sir.

Q. You say that a red light should have been displayed?

A. Yes, sir.

Q. And the reason why a red light should have been displayed was because the switch was open, leading off of the Southern tracks onto the E. I. & T. H. tracks, is that right?

A. Yes, sir, leading off the main track.

Q. Now, who left it open?

A. Why, I understand that Brakeman Parsons left it open.

Q. In other words, he left the switch open, thinking that you or your crew was going to use the Southern tracks, is that right?

A. Yes, sir.

Q. And how long before this accident occurred was that switch opened?

A. About twenty or twenty-five minutes.

Q. So that during the entire twenty or twenty-five minutes, you and your crew were right there, were you not?

A. We were not around the switch.

Q. But you were right in the vicinity of this accident, waiting to go, is that right?

A. Yes, sir.

Q. And during that entire twenty or twenty-five minutes, this switch, which should have been closed, in order to permit the Southern to go through, was left open, is that right?

A. Yes, sir.

[fol. 80] Q. In turning this switch, or in throwing the switch, rather, the man would have to be right down there at the switch point, would he not?

A. On one side of the track.

Q. On one side of the track?

A. Yes.

Q. And when he turned it, if he cared to look, or had looked, he could tell whether or not the switch point was closed or not, could he not?

A. Yes, sir; he could tell by looking at the points.

Q. In other words, if he, whoever the employe was—Carson, or whoever he was—had he wanted to, when he turned over that switch there, he could tell whether it was locked or unlocked, is that right?

A. Well, he had to unlock it, to throw it.

Q. He had to unlock it, to throw it?

A. Yes, sir.

Q. And he unlocked it and threw it, then he could tell whether it closed the track or not for the Southern, could he not?

A. Well, he noticed the points, and we were going head out when he opened the switch.

Q. In other words, at the time that Carson threw it and opened up the switch, he opened it up because he wanted it open, didn't he?

A. Well, he wanted it open because I told him "all right," and then after I looked and saw what time it was, I told him to ask the engineer if he could make Oakland City for No. 2, and when he said no, he couldn't make it, he came back, like anybody else, and saw the green light.

Mr. Eagleton: I move that the latter part be stricken out, if the Court please beginning with—like anybody else.

The Court: Sustained.

Q. What I am getting at, this switch was left open by Carson at the time, and he left it open about twenty minutes before this accident occurred, because you wanted it open, in order to go out, as an employe of the E. I. & T. H., is that right?

A. Yes, sir.

Q. And then the thing was not closed after that, was it?

A. No, sir.

Q. And it was not closed, and you knew—at least knew, regardless of the fact whether you knew it was closed or open, you knew that a Southern train was coming through, did you not?

A. I knew the Southern passenger train was due there.

Q. Yes.

A. At a certain time.

[fol. 81] Q. And that was the purpose of getting that information, was your purpose in going back and talking to the engineer, and the train dispatcher, is that true?

A. That was the purpose of talking to the train dispatcher.

Q. Yes. Now, this picture here that is marked Defendant's Exhibit No. 1, shows the conditions of the track looking west, that is the direction the Southern was going?

A. This is the main line (indicating).

Q. Main line?

A. Down this way (indicating).

Q. In other words, the straight track shown on this picture is the main line?

A. Yes.

Q. The track which turns off to the left of the picture, which would be going west, that would be the south side, wouldn't it?

A. Yes, sir.

Q. The track that turns off to the left, or south side, is the E. I. & T. H. track?

A. Yes, sir.

Q. The collision occurred between an engine of the Southern Railway and the engine of the E. I. & T. H. that was standing on the E. I. & T. H. track?

A. Yes, sir.

Q. There was no part of the E. I. & T. H. engine standing on the Southern track?

A. No, sir.

Q. And it was customary, through all the time that you worked there, for the E. I. & T. H. to use the Southern tracks, was it not?

A. Yes, sir.

Q. And it was customary during all of that time for you employes to open and close the switches, as you saw fit, and as you thought was necessary, is that right?

A. Yes, sir.

Q. So that the E. I. & T. H., as a matter of fact, used this switch point and used the Southern track at the place where the Southern left the track, and for some distance east of there, is that right?

A. Yes, sir.

Q. Necessarily, a switch, you know that from railroading—a switch and the switch points compose a necessary part of the track, you know that, do you not?

A. Yes, sir.

Q. Without that switch point being there, neither train could operate safely, could it?

A. No, sir.

Q. So that the switch and a switch point is just as much a part of the track as any other rail or length in the track, is that right?

[fol. 82] Mr. Houts: Well, that is a conclusion. I object to him asking for conclusions as to whether it is a part or not. I do not object to him telling where it is.

Mr. Eagleton: Well, I will reframe the question.

Q. Was the switch point a necessary part of the track that was necessary in the proper operation of the trains?

Mr. Houts: Wait a minute. What track are you talking about?

Mr. Eagleton: Southern track.

Mr. Houts: Well, I object to that.

Mr. Eagleton: I will change that question.

Q. Was this switch point a point that the Southern had to pass over in operating its trains?

A. The Southern had to pass over, yes.

Q. Yes.

A. Belongs—it is E. & I. property, if I am not mistaken.

Q. I am not asking whom it belonged to. I ask that be stricken out.

The Court: Sustain the motion.

Q. I am asking if the Southern had to go over that switch point. Did it?

A. Yes, sir.

Q. In operating its trains?

A. Yes, sir.

Mr. Eagleton: That is all.

Redirect examination.

By Mr. Houts:

Q. One other question I want to ask you; all the time that you were there, Mr. Hughes, you worked there for how long—five years, now, you say?

A. I worked for the E. I. & T. H. for eight years.
Q. I mean over this——
A. On the south end division, about five years, yes, sir.
Q. Yes, about five years. Now, at any time that you worked there, the Southern never used this E. I. & T. H. switch off there, did it?
A. No, sir.

Mr. Houts: That is all.

Recross examination.

By Mr. Eagleton:

Q. Can you tell me, Mr. Hughes, is trainmaster Carter of the E. I. & T. H. Railway still employed by the E. I. & T. H.?
[fol. 83] A. Yes, sir.
Q. Is he here in the Court room?
A. No; I have not saw him.
Q. Was he there right after this collision?
A. He was there shortly after.

Mr. Eagleton: That is all.
Mr. Houts: That is all, Mr. Hughes.

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L. R. Sante, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. State your name to the jury, please?
A. L. R. Sante.
Q. What is your profession?
A. Physician.
Q. How long have you been practicing as a physician?
A. Since 1913.
Q. You live here in St. Louis?
A. I do.
Q. Doctor, do you specialize in any particular line?
A. X-ray.

Q. X-ray?

A. X-ray to radium.

Q. Did you make an examination, Doctor, of Mr. Hussey, the plaintiff in this case?

A. I did.

Q. Do you remember the time that you made it?

A. I do.

Q. What date was it?

A. It was on 12-30-27—December 30, 1927.

Q. Thirtieth of December, 1927?

A. Yes.

Q. Where was that examination made?

A. In St. Marys Hospital.

Q. Was that where your headquarters were?

A. That is.

Q. He came there for this examination?

A. He did.

Q. Now, before you—you made some pictures of him at that time, did you?

A. I did.

Q. Now, before that, had you been consulted at all about his injuries?

A. I had.

Q. How long before that?

A. One week before.

Q. Who consulted you about him?

A. Well, I think that I examined him at the instance of—I really dont remember who it was—some attorney—both doctors, I think.

Q. General Barrett?

A. Probably so, yes.

[fol. 84] Q. Yes. He was Mr. Hussey's attorney.

A. Well, it was Mr.—I have it here—Mr. Jesse W. Barrett.

Q. Yes, that is the one. Now, your first consultation, what was that with respect to?

A. I was—he said there was some question about some X-ray plates that had been taken by a Doctor Joseph Backlar on 4602 Gravois, and there was a question of some interpretation of these plates, and he asked me if I would see them, and I went to see the plates.

Q. You did examine them?

A. I examined them, yes.

Q. Then it was a week subsequent that you took some of your own?

A. A week subsequent, I took some of my own.

Q. Yes. When you examined the plates of Doctor Backlar, what did you observe with respect to those plates?

A. A small irregularity extending across one of the processes of the fifth lumbar vertebra.

Q. That is down the small of the back?

A. That is the last vertebra of the back.

Q. The last vertebra?

A. The last bone of the back that joins the spine to the sacrum.

Q. Yes. Then you took some of your own?

A. Yes.

Q. What could you tell from those, from that—the plates that Doctor Backlar had taken?

A. Well, I was unable to come to a definite conclusion as to whether this was due to a fracture or not.

Q. I see. Then you took some of your own?

A. I did.

Q. At the date that you say, that is the 30th of December, of last year?

A. December 30, 1927.

Q. How many plates did you take?

A. We took four.

Q. Of what part of the body?

A. Let me be sure. There were four there. Wait a minute. Of the pelvis and lower portion of the spine.

Q. You did not take any of the skull?

A. No.

Q. Well, now, after you had taken your plates, your pictures, will you tell the jury what you concluded as to whether or not there was any injury to that vertebra?

A. I concluded that the irregularity that I saw and that was shown on the other plate was due to the upper margin of the process from the sacrum, or the last bone which comes to meet the process from the fifth lumbar vertebra where they join, and that it was not due to fracture.

[fol. 85] Q. Was there any evidence of a fracture there at all?

A. I could not see any evidence of a fracture.

Mr. Houts: That is all.

Cross-examination.

By Mr. Eagleton:

Q. Doctor, when you originally examined the X-ray picture, you reported, I believe, that there was a slight narrowing of the right side of the body of the fourth lumbar vertebra, isn't that right?

A. That is correct.

Q. And you stated at that time, it could not be entirely due to slightly rotated position in which the film was taken, that was true?

A. I did not think that it could be.

Q. And your reason for that was stated in the following sentence: "The signs of the vertebra above do not show a similar narrowing"?

A. Correct.

Q. In other words, it was your thought at that time, and so expressed, that this particular vertebra showed some signs of pathology, which were not shown in the vertebrae above and below?

A. I could not be sure about it, from that examination.

Q. And then you said that such a condition might be due to a compression of the body of the vertebra, from forcible flexion of the body, is that true?

A. Correct.

Q. And you said such symptoms do occur from violent doubling up of the body, either by a fall, or with force applied to the shoulders or to the buttocks, or to the feet, is that correct?

A. Correct.

Q. In other words, at the time you were examining this vertebra, you were trying to determine, as well as you could, whether there was a compression, fracture there or not?

A. That is correct.

Q. You took some other X-rays after that, and your doubt was removed, is that right?

A. That is correct.

Q. And it was removed to the extent that you concluded that the man had not suffered a fracture?

A. That is correct.

Redirect examination.

By Mr. Houts:

Q. And the roughness, or whatever it was there, Doctor, you know—You say that had existed, what you actually found later?

A. Oh, I think that was merely the super-imposing—I mean shadow of the one bone right on top of the other. I think that was just part of the normal makeup of the man. [fol. 86] Q. Born that way?

A. Normal structure.

Q. He was born that way?

A. Well, the vertebrae are very small when you are born, but at least I should think it was normal for the individual; I should say so.

Q. It was normal?

A. Yes.

Mr. Houts: That is all.

Mr. Eagleton: That is all, Doctor.

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Harry E. Carson, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant, as follows:

Direct examination.

By Mr. Houts:

Q. State your name to the jury, Mr. Carson?

A. Harry E. Carson.

Q. What is your business, Mr. Carson?

A. Brakeman.

Q. For what company?

A. E. I. & T. H. Railroad.

Q Where do you live?

A. Worthington, Indiana.

Q. Were you a member of Mr. Hughes' crew?

A. Yes, sir.

Q. On the night of September 2nd, 1927?

A. Yes, sir.

Q. And where were you working at that time?

A. Flagman.

Q. How?

A. Flagman, rear brakeman.

Q. You were the rear brakeman?

A. Yes, sir.

Q. And where were you and he, and the balance of the crew engaged that night, where were you working, at what point?

A. Well, we—it was the Frisco mine—Mine Junction.

Q. What were you there for?

A. Well, to get the loads of coal and place the empties.

Q. And then when you got the loads of coal, where did you take them?

A. Took the first load to Oakland, and then came back and placed our empties and got the rest of them.

Q. Got the rest of them?

A. Got the rest of our loads, came out to the main.

Q. All right.

A. Out to the switch, in the clear of the switch.

Q. All right. Now, how long had you worked it—that mine, any work there, helping take cars in and out of that switch?

[fol. 87] A. Well, I had worked the mine, off and on, something like two years.

Q. Yes. Now, just tell the jury your—give the jury what took place there, as you saw it and participated in it?

A. Well, we pulls up here with our empties, or our loads, after we had placed our empties; we had been in there and out three different times—that is, we had been over the switch three different times; Bob—that is the conductor—he called up, and the dispatcher said we was going to have to wait for an extra, west; then as soon as the extra west goes, Bob calls the dispatcher, hollers "all right", and as he hollers "all right", I unlocks the switch.

Q. What did he mean to convey to you when he said "all right"?

A. That meant that we was going to get to go ahead to Oakland City, ahead of No. 2, or get there ahead of No. 2.

Q. This extra that went west, whose train was that?

A. That was Southern track.

Q. And he said all right, and what did you do then?

A. Well, when he hollered "all right", I unlocked the switch, because we did not have very much time; of course,

they had plenty of time to get over there, if we kept moving, and I unlocked the switch and looked at it, to see that the points fitted up all right, but I never paid no attention to the light, because the light is up on the other side about fifteen foot high, so I couldn't; about the time I got it in line, Bob said, "No. 2 is on time; ask the engineer if we can make it to Oakland".

Q. When you say you lined the switch up all right, what do you mean by lining up the switch?

A. Unlocked it, lined up the siding, and looked at the points.

Q. When you say lined up the siding, does that mean open it so you could go out?

A. The switch was open for us, lined for the Southern.

Q. But that would be closed against the Southern, and you looked at the switch points, and you say it was lined for you to go out?

A. Absolutely.

Q. All right; and then what did the conductor say to you?

A. He said, ask the engineer if we would have time, or if he thought we would have time to make it to Oakland City for No. 2.

Q. Where was the engineer then?

A. He was on the engine.

[fol. 88] Q. And how far was that from the switch point?

A. Well, I would say between—well, anyhow three car lengths across.

Q. Three car lengths across?

A. Yes, every bit of it.

Q. Did you go down to the engine to ask him that question?

A. Yes, sir, walked down to the engine and asked him. He said, "Well, Harry, we better not try it"; I turned around, with nothing on my mind but lining that switch up; first thing I noticed was a green switch light; well, I would have knowed there was something wrong if I hadn't left the conductor out ahead and brakeman beyond, and I just figured one of them had lined it back again, see.

Q. You looked up and saw the light?

A. Yes, sir.

Q. And did the light show——

A. Green lights——

Q. You then thought some of the others had thrown it, to line it for the main line, is that right?

A. Never thought nothing else. If I hadn't left two men there, I would have known something was wrong, for the light would have shown lined red for the siding.

Q. Then as soon as you threw the switch, to let your train out——

A. It should have went red.

Q. Should have gone red for the main line, is that right?

A. Absolutely.

Q. Then when you went and saw the engineer, and he said you wouldn't——

A. Couldn't make it.

Q. Couldn't make it, you say you started then to throw the switch.

A. Turned around, not think- nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch, never thought practically anything about it, just thinking one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was.

Q. You sat there until the train got there?

A. Yes.

Q. Where were you sitting?

A. I was on the east side of the telephone box, I imagine, about thirty feet of the switch.

Q. How far from the switch?

A. I imagine about thirty feet.

Q. Thirty feet?

[fol. 89] A. I couldn't say definitely, but it was something like that.

Q. This was—what time of night was it?

A. Well, it must have been, I would say a quarter or ten minutes to—it must have been about twelve-thirty.

Q. Twelve-thirty?

A. Because we did not have so very much time. No. 1 was due out of Oakland, or No. 2 was due out of Oakland at 1:03, but we would have had plenty of time to come out, if we had went when we thought we — going to get to go.

Q. What did you have in the way of light, to show you around?

A. I had a regular railroad lantern.

Q. A lantern?

A. Yes.

Q. And the only lights on the switch stand were the green and the red, is that right?

A. Yes, sir.

Q. They were up fifteen feet in the air?

A. Well, I couldn't say for sure, but those Southern switches are awfully high, that is, compared with ours, lots higher than ours.

Q. Yes.

A. And on the opposite side of the track from where you throw the switch.

Q. Well, when the train came through, it took the siding?

A. Yes, sir.

Q. And ran into your train?

A. Yes, sir.

Q. Now, after things had cleared up, did you ever go back that night to see what the trouble was, why that showed green, when it should have shown red?

A. I went to the switch the first thing, and I couldn't figure what had happened, unless we had split the switch.

Q. Yes.

A. By the switch light showing green, a man would think nothing else but what it was lined for the main.

Q. Yes. Well, when you got back there, what did you discover?

A. Well, the rear trucks of the last car was, you might say, just setting in the switch points, real good, just pretty near two more feet would have put the rear-end over the switch points.

Q. How many wheels were there on the rear trucks of that last coach?

A. How many wheels on the——

Q. Yes, sir.

A. You mean on the coach or on the——

Q. Yes, on the coach.

[fol. 90] A. Two on each side.

Q. Three wasn't it—three-wheel trucks?

A. I don't think—I don't believe there was.

Q. Well, it doesn't make any difference, anyhow. Well, then, did you make any examination of the switch stand, to

find out?

A. I did not.

Q. You did not. You saw others doing it?

A. Yes, sir.

Mr. Houts: That is all.

Cross-examination.

By Mr. Eagleton:

Q. Mr. Carson, I want to clear up one statement made by Mr. Houts. When you opened this switch, you opened it for the purpose of leaving the Evansville, Indiana & Terre Haute out on the main line?

A. Yes, sir.

Q. And with it open, in that condition, that would put the Southern in on the siding, unless it was closed?

A. Yes.

Q. That is the condition you left it in?

A. Yes, sir.

Q. So that, as a matter of fact,—Mr. Houts says it was closed for the Southern—as a matter of fact, it was opened for the Southern?

A. Oh, why, yes, absolutely, it was opened for the Southern, but the switch light showed it lined for the Southern.

Q. In other words, the light is the thing that was wrong?

A. That is what fooled me, was the light.

Q. The switch then——

A. Was open.

Q. And the switch points acted the way you wanted them to act?

A. Absolutely. I looked at the points, but I did not pay no attention to the lights.

Q. And so on the occasion when you opened the switch, it acted properly, it acted properly and it was left open, is that right?

A. Yes, sir.

Q. The only thing that went wrong was the light?

A. The switch light.

Q. And you say that you did not have to go back and again look at the points, when you knew the Southern was coming through, because you thought somebody else had done so?

A. Well, you see, here is what got me—the switch should have showed red.

[fol. 91] Q. Yes.

A. But I left the conductor and the flagman there, by the telephone box, the conductor was in the telephone box when I left to go in, and the dispatcher changes their line lots of times, you know, and I just figured that the conductor or dispatcher, one, says, well, don't try to make it—just stay here, and one had stepped over and lined it back to be green, but if there had been nobody up there, I would have known something was wrong, because it would have shown red.

Q. In other words, you were mislead?

A. By the switch?

Q. By the switch light, weren't you?

A. The switch light is what fooled me, and by leaving them out there, I thought one of them throwed it.

Q. But any other sort of examination while you were walking over, had you made it, would have determined the fact that it was open for the Southern?

A. Absolutely, but I just crossed over the track and walked up the other side of the track and sat down.

Q. You had plenty of time to look at the switch points, if you had wanted to?

A. I did.

Mr. Eagleton: That is all.

Mr. Houts: That is all, Mr. Carson.

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William H. Stanley, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. State your name, please, Mr. Stanley.

A. William H. Stanley.

Q. What are the initials?

A. William H.

Q. William H. Stanley. Talk so all these lawyers and us lawyers back here can hear you, Mr. Stanley. You are working for the E. I. & T. H., are you?

A. No, sir, not now.

Q. How?

A. No, sir, not now.

Q. Well, you were in September?

A. Yes, sir.

Q. What position did you have in September, of last year?

A. Brakeman.

Q. A brakeman?

A. Yes, sir.

Q. And were you with the crew, with Mr. Hughes and Mr. Carson?

A. Yes, sir.

[fol. 92] Q. How long had you worked over that switch there, Mr. Stanley, before this accident took place?

A. Well, I had not been over there but two or three times.

Q. Only a few times?

A. Yes.

Q. But you were in the crew that night?

A. Yes, sir.

Q. And taking coal cars out of that switch, down to Oakland City?

A. Yes, sir.

Q. Do you remember how many times you went in and out of there, that night, before the accident occurred?

A. Three times, I think.

Q. And on the other times that you went in and out, was there any trouble about the lights?

A. No, sir.

Q. It operated perfectly up to that time, did it?

A. Yes, sir.

Q. Now, where were you standing when the wreck occurred?

A. Standing right by the telephone booth.

Q. And how did the light on the switch stand show?

A. Green.

Q. Green?

A. Yes, sir.

Q. You saw it, did you?

A. Yes, sir.

Q. And that indicated what?

A. Clear track for the Southern.

Q. Clear track for the Southern?

A. Yes, sir.

Q. Now, before this passenger train came along, had another—had a freight train gone west?

A. Yes.

Q. Over the same switch?

A. Yes, sir.

Q. That was known as an extra, wasn't it?

A. Yes, sir.

Q. Southern extra?

A. Yes, sir.

Q. There had not been any trouble then, had there?

A. Not a bit.

Q. Switch was working perfectly?

Mr. Eagleton: I suggest you don't lead him. Just let him testify on his own account.

Mr. Houts: All right. We won't quarrel about that.

[fol. 93] Mr. Eagleton: You won't get me to say anything. Let him testify.

Q. Well, after the Southern train took the siding, and they had the wreck, did you go back to examine the switch, to see what was the matter?

A. Yes, sir.

Q. What did you observe when you went back there?

A. Found the switch open.

A. What is that?

A. Found the switch open, lined up for the passing track.

Q. That is, opened, so as to let your drag out on it, throw the Southern in on the switch?

A. Yes, sir.

Q. If the switch had worked properly, what light would have shown, with it in that condition?

A. Red.

Q. Red. When you went back to the wreck what was the light still showing?

A. Green.

Q. Still showing green?

A. Yes, sir.

Q. Did you make any examination of the light and the stand where the light is, to see what was the matter?

A. Yes, sir.

Q. What did you observe?

A. Found the connecting rod off of the target rod.

Q. Connecting rod was off of the target?

A. Yes, sir.

Q. If the connecting rod had not been off the target, if a man throws the switch, what does that do to the light?

A. That turns the light.

Q. Throws the light also?

A. Yes, sir.

Q. Throws a connecting rod, that operates from the switch clear across the track to the light on the east side?

A. Yes, sir.

Q. And turns it whichever way the switch is thrown, doesn't it?

A. Yes, sir.

Q. If the switch is thrown so that it opens up onto the E. I. & T. H. track, the light will be red, is that right?

A. Yes, sir.

Q. And if it is thrown so as to close the switch, so that the Southern train can pass over it, how would the light be?

A. Green.

[fol. 94] Q. Green. Well, that is all.

Mr. Eagleton: No questions.

Mr. Houts: That is all.

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Mr. Eagleton: I should like to ask Mr. Carson a question.

HARRY E. CARSON, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand testified further on behalf of the defendant as follows:

Recross-examination.

By Mr. Eagleton:

Q. Mr. Carson, you said something, while on the stand, about those Southern lights being higher than your lights. What lights were you referring to?

A. The switch light.

Q. The switch light. Is that the switch light that is involved in this accident?

A. Yes, sir.

Q. That is a Southern light?

A. Yes, sir.

Q. In other words, the light that did not work red on this occasion was a Southern light, is that right?

Mr. Houts: What is that—pardon me—I did not get that.

Mr. Eagleton: I say, the light that did not work red on this occasion was a Southern light.

Mr. Houts: Well now, wait a minute. That is something that depends on a lot of circumstances.

Mr. Eagleton: Well, what do you mean?

Mr. Houts: He does not know whom that belongs to.

Q. When you said it was higher than yours, you mean——

A. Yes.

Q. When you referred to yours, you meant the Evansville, Indianapolis & Terre Haute?

A. Yes, sir.

Q. What kind of lights does the Evansville, Indiana & Terre Haute use?

A. Well, they are a different switch stand.

Q. They are what?

A. They are a different switch stand.

Q. What sizes are they?

A. I couldn't tell you that.

[fol. 95] Q. Well, what was the distinction between the Evansville, Indiana & Terre Haute lights that you referred to and the Southern lights that you referred to—you said one was higher, didn't you?

A. Well, you see, our switches works from about up even with our breast, like, and these, you step right down on the ground and unlock them and throw them over; when you throw them over, you are there, where you can absolutely see the points and see that they line up.

Q. In other words, in looking at the Southern switch points, you can see that they line up?

A. Sure.

Q. But their lights are higher, that is what you said, didn't you?

A. No; if I said higher, I didn't mean it.

Q. I thought you said the Southern was higher?

A. Here is the way I mean that: we have to stoop down, see, on the Southern switches and unlock them, in fact, they are, you might say, sitting on a couple of ties—throw them over, while the only way we unlock our switch is about even with our waist-line.

Q. This light here that is shown in Defendant's Exhibit No. 2, that is a pretty high light, isn't it—signal light?

A. Well, it is just about standard equipment.

Mr. Eagleton: All right.

Redirect examination.

By Mr. Houts:

Q. Mr. Carson, when you are speaking of E. I. & T. H. switches, as distinguished from Southern switches, do you mean E. I. & T. H. switches on the E. I. & T. H. lines?

A. On our line.

Q. And it was on Southern property, that is right?

A. Yes, sir.

Q. That is all you mean by that?

A. That is what I meant, sure.

Mr. Houts: All right. That is all, Mr. Carson.

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T. E. Veith, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. Please state you name to the jury, Mr. Veith.

A. T. E. Veith.

[fol. 96] Q. What is your business, Mr. Veith?

A. Supervisor, bridges and buildings, Southern Railway.

Q. For the Southern Railway?

A. Yes, sir.

Q. You are the supervisor of bridges and buildings for the Southern Railway?

A. Yes, sir.

Q. How long have you been with the railroad, Mr. Veith?

A. I have been working for this piece of track forty years.

Q. Does your business take you over the line frequently?

A. Yes, sir.

Q. And in your work, are you familiar with switches and signal lights, and things of that kind?

A. I am. I watch them as I pass over the road.

Q. Yes.

A. Examine some of them.

Q. Where were you on the night of September 2nd, Mr. Veith?

A. I was no No. 2. I got on at Louisville.

Q. That is the train that was wrecked?

A. Yes, sir.

Q. That is the same train that Mr. Hussey was on?

A. I presume so. I was on the train that was wrecked.

Q. You took the train at Louisville, did you?

A. Yes, sir.

Q. And where were you at the time of the wreck?

A. That is in—pertaining as to in the train?

Q. In the train.

A. I was in the rear of the ladies' coach, the day coach, which is the third car from the rear, just ahead of the second sleeper.

Q. Just ahead of the second sleeper?

A. Yes, sir. They had two sleepers in the train that night.

Q. How many?

A. Two.

Q. Two. You were not in the sleeper?

A. No, sir. I was just ahead of it.

Q. Were you sitting up?

A. No, sir. I was laying down in a long seat.

Q. How is that?

A. I was laying down in a long seat, on a smoking seat.

Q. When the wreck occurred, what happened, what occurred to you?

A. Well, I did not hardly know, because I was asleep.

Q. You were asleep?

[fol. 97] A. And of course (the witness indicates with his hands), when they stopped suddenly,—it made me look around. The first thing I thought about was getting out.

Q. Yes.

A. But past experience, I kind of hesitated for a little bit, I didn't know but what I might be on a trestle; I didn't know where I was.

Q. Yes. Well, go ahead and just tell what you did then.

A. Well, I thought I would get squared around, smoke and dust settled a little bit, and I got out, I couldn't get out the rear, the vestibule of the rear of the ladies' coach, but I went over to the head of the sleeper and got out of that side, and I was very easy about getting down, until I knew I was on the ground.

Q. Well, after you got down on the ground, what did you do?

A. Why, the first thing I did was to go down to the rear-end, I knew that that was in a siding, because there was two tracks.

Q. Yes.

A. So I goes down to the switch.

Q. Is the Southern track there single track?

A. Yes, sir.

Q. Single track?

A. I went back to the switch to see how things were there, and I saw the switch was throwed for the side track.

Q. And where was the rear coach standing?

A. The rear coach, that is, the rear trucks of the rear sleper, that had three pair of trucks, three pair of wheels to the rear truck.

Q. Yes.

A. And the center wheel was about twelve or fourteen inches in on the switch point; that left one wheel off of the switch point.

Q. On the main line?

A. On the main line, yes, sir.

Q. And was the switch opened or closed?

A. Why, the switch was opened for the side track.

Q. Open for the siding?

A. Yes, sir; and the lever was throwed and the keeper was in.

Q. Did you go over and look at the keeper and see how it——

[fol. 98] A. I did, on the switch lever, yes.

Q. The switch lever?

A. And it was in place.

Q. It was in place, showing that?

A. That it had been throwed, and the keeper was in place, so that it could not come up.

Q. Now, this position of this lever, did it show that the switch was as it should be, from the position of the lever, I mean?

A. From the position of the switch and lever.

Q. That is what I mean.

A. It was there in the keeper, that is, latched, and the keeper was in place, so it could not come up.

Q. Yes.

A. It was throwed for the side track.

Q. For the siding, that is the way the lever——

A. It couldn't have come up any other way, unless somebody had throwed it.

Q. The lever was in the proper position, the position it ought to be in, if the switch was open for the siding?

A. The switch was open for the siding.

Q. Yes.

A. And the lever was in place.

Q. In its proper place?

A. Proper place, for it had to be open to go in on the side track.

Q. All right. Now, when you saw that, what next did you observe?

A. Well, the next thing I looked at the points.

Q. Yes, and how were they?

A. You say what might have put those——

Q. How were they?

A. They were all right, that is, fitting up good with the north rail leading into the side track.

Q. Yes.

A. And the next thing, why, let's see—I don't know whether I just went and looked at the other rod the next thing or not—I won't say that; I know I called a conductor's attention to it, the switch lever being throwed over, and then the keper, and that the switch was throwed for the siding.

Q. For the siding?

A. And later, why we looked at the connecting rod to the A-stand.

Q. Now, before you get to that connecting rod, did you look at the light, to see how it showed?

A. No, sir. I could not say about that.

Q. At that time, you did not?

[fol. 99] A. No, sir, I did not; I could not say that—if I looked at the lights, I did not pay much attention to them.

Q. All right. But did you, at any time, look at the light, later on?

A. Well, later on, yes, but then I did not——

Q. What was the light, up and down the track?

A. Well, it was about proper shade.

Q. Green?

A. Green, yes.

Q. Green, that is what I mean, it was a green light, up and down the track?

A. Yes.

Q. All right. Now, did you examine at the base of the light, to see what was the matter there?

A. Yes, sir. I did not right at that time, because it was dark, and we had no lanterns or anything, but at break of day, why I did go back there and looked at the crank and the connecting rod, from the bridle over to what we term as the A-stand.

Q. Yes.

A. The lever or the crank was fastened to the connecting rod, but it was off of the upright.

Q. Now, can you take your piece of paper and show the jury just about how that crank looks?

A. I could. I have a piece here, if it will be big enough.

Q. Well, here is one (indicating). Just make them a rough litle sketch of the crank that connects up with the upright of the light and also connects with the throw-rod.

A. Throw-rod. All right. Now, I may not get the dimensions just right.

Q. That doesn't make any difference—just so they can understand what you mean.

A. I will make it a little bit large. (The witness draws a sketch). I ain't going to say this square is just in this position, but it gives the idea.

Q. That will give them the idea.

A. Now then, I will make it this way (indicating). There is two views of it.

Q. All right. Do you want to explain it?

Q. Explain it to the jury—just explain it to the jury, let them see it, point to it and let them see it.

A. This (indicating) is what we call the crank, bottom crank, on the upright of an A-position.

Q. Switch lamp?

A. Switch lamp. And this (indicating) is a side view; this is about seven-eights to an inch thick, and it is something near five inches long; I couldn't say just the exact length. This is a pin, that this connecting rod fastens onto, and that is the way it looked sideways, and looking up [fol. 109] and down it looks like that (indicating). This here staff goes through a base here, with a collar on it, so it cannot go clear through, so it will rest, and the bottom of that is square.

Q. Now, the staff you are talking about is the staff that the light is on?

A. I am talking a out the staff that the lights is on.

Q. All right. The switch stand is over on the south, and this lamp stand (indicating), the switch light stand is on the north.

Q. On the north crossing track?

A. The crossing track, and this here stand (indicating), or this here staff is—oh, it is short, but possibly eighteen inches long, and then it has a splice from there up, and it fits on here.

Q. Fits in that hole (indicating)?

A. Yes, sir.

Q. That is, the lower end of this rod is square, and it sets in this square thing there (indicating), is that right?

A. Yes, sir. I will just draw this here rod.

Q. Let's don't draw too much. Maybe we will get it all confused.

A. All right. The bottom of this rod (indicating) fits right in there, in that there square.

Q. Yes.

A. And there is a set screw in here (indicating).

Q. Yes.

A. That comes up in here (indicating) and fastens it.

Q. Holds it in place there?

A. Yes, sir.

Q. Now, over here is where the throw-rod connects up, is that right?

A. The throw-rod connects on here (indicating).

Q. And if you pull the throw-rod this way (indicating), it will turn that around?

A. Yes.

Q. And if you push it back that way (indicating), it turns it back, is that right?

A. It sets about on a quarter like that (indicating), but when you throw it that way, it goes that way.

Q. And throws the light on?

A. Well, then you light one quarter, and then when you throw back, it turns it back.

Q. Now, I think the jury probably under-tands that. Now, what did you discover when you got over here, (indicating), with respect to this crank here, as you call it?

A. This crank (indicating) was still fastened to the throw-rod.

Q. Throw-rod connection was all right?

[fol. 101] A. Yes, it was all right, and it was fastened to the bridle bar.

Q. Yes.

A. Everything was snug and tight, but when you got and looked in under here (indicating), this here is—this set screw is a square head there, that there looked kind of bright on the corner.

Q. That is the head of the set screw?

A. Yes, sir; and this set screw was through there, just the way—I couldn't feel this way (indicating), you know—I judge to be a good or full 1/16 of an inch.

Q. Yes.

A. And this here (indicating) fit up snug and tight.

Q. All right. Now, what else did you observe?

A. Let's see—the next thing I observed was right in a—the best of my knowledge, now, it was right over here (indicating), right opposite from that set screw, but opposite, kind of in a corner, but that was a fresh crack.

Q. That crack was in the crank?

A. Was in this crank, right there (indicating), a fresh crack clear through.

Q. Clear through?

A. Yes, sir.

Q. Now, would that crack let that drop off?
A. That crack will open that up.
Q. And let that drop off?
A. Yes, sir.

Mr. Eagleton: Open what up and let what drop off?
The Witness: Why, this crack will take the tension off of the sides and finally let that drop off..
Mr. Eagleton: Finally let what drop off?
The Witness: This crank (indicating).

Mr. Eagleton:

Q. The crank drop off?
The Witness: Crank off of the staff of this A-position lamp stand.

Mr. Eagleton:

Q. And the crack was in what?
The Witness: The crack was in this crank (indicating).

Mr. Eagleton:

Q. The crack was in this crank, and the crack would open up and let the crank drop off?
The Witness: Yes.

Q. You say that was a fresh crack?
A. Fresh crack, absolutely bright.
Q. Now, does this photograph marked Defendant's Exhibit No. 2 correctly represent that switch stand there?
[fol. 102] A. It does, yes, sir.
Q. And the light is up at the top here (indicating), is it?
A. The light is up at the top here (indicating), yes, sir.
Q. And this is the throw-rod down here (indicating)?
A. This is the throw-rod, from here on over (indicating), and the crank stand is right——
Q. Right under there (indicating)?
A. As I represent here (indicating).
Q. Yes.
A. And this is the upright over here (indicating); this stood there—it is two separate pieces—we have got a splice on there, but there is a collar right there, to hold this on.
Q. Yes.

A. Set screw right in here (indicating).

Q. Now, does this rod connect up with——

A. This rod here (indicating).

Q. That is the throw-rod?

A. That is the throw-rod.

Q. What does it connect up with?

A. That connects up with the bridle bar that connects on to the switch points.

Q. Yes.

A. And connects also over to the——

Q. Lever?

A. The switch stand.

Q. Yes.

A. Whenever they throw the switch stand, that bridle bar is fastened to the switch points, and it throws them over to one rail or to the other rail, as the case may be, and a continuation of that rod to this crank (indicating) throws that light one way or the other.

Q. One way or the other?

A. As the case may require. Like in this case here, where the switch stand was throwed for two trains to go in the siding, that should have been red.

Q. Yes.

A. And if it is for the Southern trains to pass over, it should have been green.

Q. That is right. Now, this drawing that you have been testifying from, that you made yourself, we will have it marked as Exhibit No. 3. I believe that is all I want to ask.

(Said paper was marked by the reporter as Defendant's Exhibit No. 3.)

Cross-examination.

By Mr. Eagleton:

Q. Mr. Veith, when it was daylight was when you found out about this crack, was it not, about the freshness?

[fol. 103] A. Well, it was.

Q. When it was daylight?

A. Well, it was before daylight; it was at the break of day, as soon as we could begin to observe anything, and later, also.

Q. And didn't the trainmaster, Mr. Carter, of the E. I. & T. H. Railroad Company come up there and inspect this thing with you?

A. I don't know Mr. Carter. I don't know as I——

Q. I will ask you, regardless of whether you know him or not, didn't a gentleman employed by the E. I. & T. H., Mr. Carter, come up, and when you showed him this crack didn't he state to you that that was made the afternoon of the day the accident occurred, when they put the crank on the bottom of the shaft and forced it up with a crow-bar?

Mr. Houts: Wait a minute. I object to that, if Your Honor please. He is asking him to testify as to what somebody else said.

Mr. Eagleton: I think that is proper, to show later by Mr. Carter the freshness of this crack.

Mr. Houts: Show it by Mr. Carter, if you can get him. I don't even know him.

Mr. Eagleston: Just a second. I think I can show it by this witness—if he later agreed with him—if he agreed with Mr. Carter that is the way it was made—indicating it.

Mr. Houts: I object to that question, because that is bringing in the testimony of somebody else that is not a witness, and I do not even know who he was.

Mr. Eagleton: Mr. Carter, the E. I. & T. H. trainmaster, you could find him, as well as the conductor.

The Court: Let's go ahead.

Mr. Eagleton: May I proceed, if the Court please.

The Court: Yes. Overrule the objection.

Q. Didn't Mr. Carter come up there and tell you that on the afternoon this accident occurred, that they had examined the crank, and in order to get it off, they had used a crow-bar and put the crank on the bottom of the shaft and forced it off with a crow-bar, and that is what made that crack—didn't he tell you that?

A. I don't recall it.

[fol. 104] Q. Didn't he tell you also that he noticed the crack at that time across the top of the crank, and that it was a hairline crack, is that right?

A. I do not recall it.

Q. You do not recall it?

A. Of course, if it had been there in the morning, it would have been there at noon, or in the afternoon. We still got the crank.

Q. Well, did Mr. Carter tell you that?

A. I don't know. I don't know Mr. Carter.

Q. And did a road foreman or engineer by the name of Culbreth, did he come up and join in that conversation, and you all there agreed that that is the way it happened?

A. I don't know Mr. Culbreth, or whatever his name is.

Q. Now, you found, in addition to finding what you found, you found some rust in where that pin set in that crank, did you not?

A. A pin?

Q. That the set screw apparently—did you find this condition, on your inspection: that the set screw apparently did not protrude far enough through the crank to hold the crank on the shaft, did you find that?

A. Well, that crank was—that set screw was in there about one-sixteenth of an inch.

Q. Well, did it protrude far enough to do this particular thing that is mentioned here, or not?

A. Well, it had.

Q. It had?

A. Previously, yes, sir; it had never been off before.

Q. Were you there when Conductor Baerd, of train No. 2, in your presence, tried to turn the set screw with his fingers, but it was rusted, and it would not turn?

A. You cannot turn them with your fingers.

Q. Now, this thing—thing turning or not turning, I will ask you, as an engineer, if it could not have been prevented by having a bolt hole drilled through the bottom of the shaft, according to the design, with the crank properly secured to the shaft by means of a bolt, couldn't it be prevented?

A. Well, yes, if there was a bolt hole in, but that might have been a pattern that was made before they put these bolt holes in. That is not the only one that was on the road.

Q. But by drilling a bolt hole in there, according to the design, and the crank properly secured to the shaft by

means of a bolt, that would have prevented this sort of occurrence, wouldn't it?

A. Well, yes, it would.

Q. And another way you could have prevented it, would be by having the counter bore in the shaft properly countered or centered, so as to receive the set screw, is that right?

[fol. 105] A. Well, sure, sure, if that had been put on that way, but possibly when that there was made, why they didn't fix them that way.

Q. And another way it could have been prevented was by having an automatic block signal system?

A. Well, of course there—all roads got that.

Q. That is what they are for, though, isn't it?

A. Well, yes, but they fail.

Q. Yes. All right.

Redirect examination.

By Mr. Houts:

Q. State whether this is standard equipment, at that time?

A. You mean this switch?

Q. Yes.

— Yes, sir, it was.

Mr. Houts: That is all.

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H. Baerd, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. State your name to the jury, please, Mr. Baerd?

A. Sir?

Q. State your name to the jury, please?

A. H. Baerd.

Q. Where do you live, Mr. Baerd?

A. My home at present?

Q. Yes.

A. Louisville, Kentucky.

Q. What is your business?

A. Passenger conductor of the Southern Railway, St. Louis Division.

Q. Were you on No. 2 the night of this wreck near Mine Junction?

A. September 2nd?

Q. Yes.

A. I was the conductor in charge of that train, yes, sir.

Q. How long had you been running on that run, Mr. Baerd, how many years had you been running on that run?

A. Well, at that time, I had been on the run about four years, but I had run on the run prior to that.

Q. How frequently would you pass this Mine Junction switch?

A. Well, we make two round trips a week. I pass it four times.

Q. A week?

A. Yes.

Q. Yes. Now, you say you were on the train the night of the wreck?

[fol. 106] A. I was in charge of that train on the night of the wreck, yes.

Q. And where were you located in that train?

A. I was riding in what we call the combination car; it is a combination smoker and sleeper, or passenger car, and the other end is used for baggage, and sometimes express; in the event of an overflow of express, use it for that.

Q. Well, after the things had cleared out, what did you do after the wreck?

A. After the wreck occurred?

Q. Yes.

A. Well, we were left in the dark, of course, when the wreck occurred, and I was inside of the car a period of at least four to five minutes, feeling around in the dark, to locate my lantern, knowing that I could not do anything out there without a lantern; by the time I found my lantern and got it lit, it was at least five minutes, and I got out on the ground, on the north side of the train. I heard voices in front, crying for help. I hesitated for possibly ten or fifteen seconds, then I thought of protecting the rear end of

the train and getting in communication with our dispatchers, and that was important part to do; so I went to this telephone booth, called up our dispatcher and notified him that we had collided with a Big Four freight train, and that there were a number of people injured, and to get doctors on the ground as quick as possible.

Q. Yes.

A. After I conveyed that information to the dispatcher, I then went out to ascertain the cause of this trouble.

Q. Yes.

A. On account of this light showing green, I was led to believe that we had collided on the main track, but I learned, after investigation, that we had collided with a train on the side track.

Q. Yes.

A. I found that the rear end, the siding, the switch was set for the siding, and there were two wheels of the rear sleeper resting on the through rails.

Q. Did you observe the light as soon as you started?

A. Yes, I first saw the light the moment I got on the ground.

Q. How was it set?

A. Well, it was green, but as I got near the rear of the train, I would say within ten or twelve feet, the switch light was cocked in such a position that I could see both red and green, more green than red.

Q. Could you see that—how close did you have to get before you could see any red?

[fol. 107] A. Oh, I would say twelve—twelve or fifteen feet.

Q. At a greater distance, how did it show?

A. It showed green.

Q. Green?

A. Yes.

Q. Well now, did you examine, to see how the switch was set for the siding and the light was showing green?

A. Yes; that is a part of the conductor's duty, to try and ascertain the cause of a derailment or anything that might happen.

Q. Yes. Tell what you discovered?

A. Well, I began tracing—our duty would be to trace the rail from the point of the accident back as far as you could

find marks on the ties or on the rail, but in this case, I did not have to go back but a few steps. I seen that the switch was set for the siding; I examined the points and found them in good condition; then I looked around, later on, to find out why this light did not show red, as it should have showed, if it was in working condition.

Q. Yes.

A. And I found that the rod connected with the bridles—the bridles is what holds the two switch points together.

Q. Yes.

A. I found that the rod that goes over to connect to the upright that carries the switch light was disconnected at the bottom. I put my hand under there and I found that it was disconnected; it was dark underneath those, at that time, and I put my finger in this connection hole, and I found that the set screw was at least one-sixteenth of an inch inside.

Q. Yes.

A. And I tried to turn it with my fingers, but it was rusted in such a manner that I could not turn it with my fingers.

Q. Yes.

A. So I made my report accordingly.

Q. Well then, you went ahead, I suppose, with your regular duties after that?

A. Yes, sir; I went ahead then to ascertain the number of people injured and to get the nature of their transportation, and their address, and so on.

Q. And the relief train came, and the doctors came?

A. Yes, sir, the relief train, and come of the doctors got there ahead of the relief train; they came in automobiles.

Q. Yes.

A. They were on the ground, I judge, thirty-five or forty minutes before the relief train; see, they had to call a crew and get the relief train, in order to move, but the doctors, [fol. 108] fortunately, there was a road just a few feet of us, and they came in their machines and were on the ground, sometime before the relief train came.

Q. What happened to your engineer and fireman?

A. He was killed outright.

Q. Both of them?

A. No. My fireman lived. Perhaps he was scalded inwardly, and he could not talk but very little; I couldn't get but very little information out of him.

Q. And the engineer was killed?

A. He was killed, and the fireman of the Big Four engine was killed.

Q. That is all.

Mr. Eagleton: That is all.

Mr. Houts: That is all, Mr. Baerd, that is all.

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Mr. Eagleton: I want to ask Mr. Hughes one question before we adjourn.

ROBERT E. HUGHES, a witness of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand testified further in behalf of the defendant as follows:

Recross-examination.

By Mr. Eagleton:

Q. Mr. Hughes, just for the purpose of the record, when you say you called the train dispatcher before this accident, at Princeton, Indiana, am I right in saying that you did call a train dispatcher there for orders?

A. Yes, sir.

Q. What train dispatcher was that?

A. Why, I don't know what his name was.

Q. Well, was he a Southern Railway dispatcher?

A. Yes.

Q. You called him to get orders to open up that switch, you called a Southern Railway train dispatcher?

Mr. Houts: No, he did not say to get orders to open up the switch.

Q. For your orders to go ahead, as to the clearance and going on ahead, you got your orders from the Southern Railway train dispatcher, did you not?

A. I got orders from the Southern Railway.

Q. Yes. All right. That is all.

[fol. 109] Redirect examination.

By Mr. Houts:

Q. Wait a minute. What did you ask the dispatcher?
A. I asked him for runing orders to Oakland City.
Q. For what?
A. Running orders to Oakland City.
Q. I do not understand.
A. For running orders to Oakland City.
Q. To Oakland City?
A. Yes, sir.
Q. To find out whether the Southern train was coming?
A. Yes, sir.
Q. That is what you asked him?
A. And for us to go on.

Mr. Houts: Yes. That is all.

Recross-examination.

By Mr. Eagleton:

Q. You were asking for your own running orders to Oakland City, you were the ones to go to Oakland City, weren't you?
A. Yes, sir.
Q. And you were asking the Southern Railway train dispatcher if it was all right for you to use their tracks for that purpose, isn't that the idea?
A. That is about the idea.

Mr. Eagleton: Yes. All right.

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Roy Larson, a witness of lawful age, being duly produced, sworn and examined, testified as follows:

Direct examination.

By Mr. Houts:

Q. State your name to the jury, please?
A. Roy Larson.
Q. Where do you live, Mr. Larson?

A. Francisco, Indiana.

Q. What is your business?

A. I am section foreman for the Southern.

Q. How long have you worked as section foreman for the Southern?

A. Fourteen years.

Q. Now, as section foreman for the Southern, what are your duties, with respect to making inspections of the line?

A. My duty is to inspect—you mean the switches? My duty is to inspect those switches once a week, and to make a report on the condition I found them in.

Q. Now, was it your duty to inspect this particular switch where this wreck occurred?

A. Yes, sir.

Q. And how frequently did you inspect that switch?

[fol. 110] A. Once a week.

Q. How is that?

A. Once a week.

Q. About how many years has that switch been there?

A. It has been there about five years.

Q. How long before this wreck did you make an inspection?

A. On the 2nd of September.

Q. On the 2nd of September?

A. Yes, sir.

Q. And this wreck occurred on the morning of the 3rd of September?

A. On the morning of the 3rd of September.

Q. Is that right?

A. That is right.

Q. Now, what do you do—or what did you do when you inspected that?

A. Well, I looked at all those connecting rods and all the bolts, to see there were none loose or none out, and I found them all in good shape.

Q. Was there anything you could see about the light, or the rod that supports the light, or the throw-rod, and its connections, that crank, did you inspect all those?

A. Yes, sir.

Q. Was there anything that you discovered about them?

A. I did not discover a thing.

Q. Had that ever been out of order at any time before?

A. It never had.

Q. And how many trains passed over there a day, at the time?

A. Oh, I expect fifteen or twenty.

Q. How frequently do the E. I. & T. H. people go in and out of that switch there?

A. Well, that depends on how steady the Mine works. Sometimes they go in there five times a week, you know, every night; of course, if the Mine don't run, they don't use it.

Q. Well, up to the time this wreck occurred, how much did that mine run?

A. Well, about four days a week, I would figure.

Q. About four day a week?

A. Yes.

Q. And when the mine is operating, they go in there and get cars out?

A. Get coal.

Q. Did you personally make an inspection of this switch on the 2nd?

A. Yes, sir; I have to do that personally.

Q. Did you get down and get under, reach under there?

A. Yes, sir; I did; yes, sir.

Q. And observe it?

A. Yes, sir.

Q. You say you found nothing the matter with it?

A. Found nothing the matter with it whatever.

Mr. Houts: That is all.

[fol. 111] Cross-examination.

By Mr. Eagleton:

Q. Mr. Larson, you are the section foreman for the Southern?

A. Yes.

Q. On September 1st, 1927—that would be two days before the accident—you went to this very switch point for the purpose of inspecting, did you not?

A. September 2nd.

Q. As a matter of fact, it was the 1st that you went there, wasn't it?

A. No; it was the second.

Q. That collision occurred on the 3rd, the morning of the 3rd?

A. On the morning of the 3rd.

Q. You say it was the morning of the 2nd you went there?

A. The morning of the 2nd.

Q. And the reason that you went there was that you had had a report made to you that the bridle rod had been damaged by a dragging brake beam, and that the south end of the throw-rod was disconnected?

A. No. That there happened before that. I did not get no report on it. I found that myself. I don't exactly know what date that was.

Q. Didn't you report to your superiors right in connection with this very collision, the identical thing that I am talking about?

A. Yes, sir, I did. I found that bridle rod was hit right in the middle by something dragging on the train.

Q. How long would you say that was before this collision occurred?

A. Well, I don't exactly remember. I wouldn't say.

Q. Well, give us your estimate of how many days it was before?

A. It was over two or three, anyway.

Q. Just two or three days?

A. Yes, sir.

Q. As a matter of fact, wasn't it September 1st that it had been damaged?

A. Well, it might have been September 1st.

Mr. Eagleton: That is all.

Redirect examination.

By Mr. Houts:

Q. Now, just explain to the jury what that was, that Mr. Eagleton has asked you about, that was damaged?

A. Well, that was the bridle rod that holds the switch points together.

Q. That is in the middle, between the two tracks?

A. That is in the middle of the track. That had nothing to do with the throw-rod that was knocked off.

Q. And after that was knocked down, that bridle rod——

[fol. 112] A. No, sir; that bridle rod is still on there yet.

Q. The same bridle rod is on there yet?
A. The same bridle rod is on there yet.
Q. Still there?
A. Still there.
Q. Working properly?
A. Yes, sir.
Q. How was it damaged—bent, or something like that?
A. Just bent the least bit, right in the middle.
Q. And after you had observed this bent bridle rod, you made this inspection which you tell about, didn't you?
A. Afterward, after that was bent, yes, sir.
Q. Yes. And you found, you say you found that the—as far as the light was concerned and the throw-rod, that was not affected at all?
A. No, sir, it was not.

Mr. Houts: All right.

Recross-examination.

By Mr. Eagleton:

Q. Didn't you report, right in connection with that same report, that in order to repair the bridle rod, that you had to remove the south end of the throw-rod and disconnect it, in order to repair the bridle rod, didn't you report that?
A. Yes, sir.
Q. Then it did have something to do with the throw-rod, didn't it?
A. Not the one that was off, because there is two throw rods to that switch; there is a bridle rod and two throw rods.
Q. Oh, you took one of the throw-rods off?
A. Off of the switch-rod.
Q. Yes, and that was damaged, that had occurred two days before?
A. Yes, sir.

Redirect examination.

By Mr. Houts:

Q. Now, that throw-rod you say you took off was connected with what?
A. Was connected to the switch stand.

Q. It was not one that was connected to the light?
A. It was not the one that was connected on to the light.

Mr. Houts: That is all.
The Court: That is all.
Mr. Eagleton: That is all.

At this point, the Court having duly admonished the jurors touching their proper conduct while they shall be absent from the Court room, an adjournment was had until Tuesday, November 13, 1928, at ten o'clock A. M.

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[fol. 113] Pursuant to said adjournment, the Court convened at ten o'clock A. M., November 13, 1928, and a jury being present, the following proceedings were had:

JACK W. HUSSEY, the plaintiff, of lawful age, having been heretofore duly produced, sworn and examined, upon being recalled to the witness stand testified further as follows:

By Mr. Houts:

Q. Mr. Hussey, there was one question I forgot to ask you yesterday. Has Doctor Backlar ever rendered you a bill?
A. No, sir. He has told me about what it would be. He has not actually——
Q. He has never rendered you a bill, and you have not paid him anything?
A. Sir?
Q. You have not paid him anything, either?
A. No, sir.
Q. What is your salary with the Atlas Portland Cement Company?
A. $250 a month, sir.

Mr. Houts: That is all.

By Mr. Eagleton:

Q. Mr. Hussey, I want to ask you one or two questions while you are on the stand. There is some testimony here about going to Doctor Backlar's office for X-ray pictures, and to one other doctor's for pictures, and to permit Doctor

Leighton to examine you. Will you tell us under what circumstances you went there to those offices at that time?

A. Immediately after I was hurt and Doctor Backlar came to my house, he recommended that I be taken to a hospital, but I did not want to go to a hospital; I would rather stay at home; but he said that I could, under the condition, that as soon as possible, I would come over and let him take X-rays. About eight or ten days after that, Doctor Backlar said—he asked me if I could come over to his office—if I felt like coming out of bed, and with assistance in getting over to his office for this X-ray, that I concluded to find out what was the cause of the trouble in my back. I told him I thought I could, and I got my wife and the assistance of our janitor and went across the street to Doctor Backlar's office, and was over there about forty-five minutes or an hour, and came right back home, with the assistance of both my wife and the janitor, and went back to bed. That was for the X-ray with Doctor Backlar's.

Mr. Eagleton: That is all.

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[fol. 114] Louis P. Wellman, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Houts:

Q. State your name, please?
A. Louis P. Wellman.
Q. Where do you live, Mr. Wellman?
A. Cincinnati, Ohio.
Q. And what is your business?
A. Custodian of contracts for the Evansville, Indianapolis & Terre Haute Railroad Company.
Q. Now, was there a contract entered into between the Southern Railway Company and the Evansville, Indiana & Terre Haute Railroad Company, with respect to the connection at Mine Junction, Indiana?
A. Yes, sir.
Q. Have you the original contract with you?
A. Yes, sir, I have.

Q. Will you produce it?

A. (The witness hands a paper to Mr. Houts.)

Q. I see some correspondence attached to the contract. Then were letters exchanged between different officials?

A. Yes, sir.

Q. Attached to the letters is what purports to be a copy of the contract. Is that the original contract?

A. Yes, sir; you have the original agreement.

Q. Yes. That is signed by the Southern Railway Company, by——

A. H. W. Miller.

Q. Miller.

A. Yes. As Vice-President.

Q. And also signed by H. W. Miller as Vice-President of the Southern Railway, of Indiana?

A. H. W. Miller.

Q. And it appears to be signed "Evansville, Indianapolis & Terre Haute Railway Company, by A. H. Smith".

A. A. H. Smith, President.

Q. I will have it marked, identified.

(Said document was marked by the reporter as Defendant's Exhibit No. 4.)

Mr. Eagleton: I want to look at it. I think I can do this rather quickly, if the Court please, and save time.

(At this point, Mr. Houts handed the Court what he said was a copy of the contract, and both the Court and Mr. [fol. 115] Eagleton looked over the respective documents handed to them at length.)

Mr. Eagleton: If the Court please, I have casually read this contract, and I wish to make an objection into the record: that contract is between parties—that the plaintiff is not a party to the contract, and that it cannot be made binding on the plaintiff or anyone not a party to it, and it cannot and does not change plaintiff's rights under the law, and for that reason it is irrelevant and immaterial.

The Court: Do you Gentlemen wish to argue the matter?

Mr. Eagleton: I have no objection, if Mr. Houts wants to be heard, outside of the hearing of the jury, I should be glad to hear from him on it.

(Here ensued a coloquy between Court and counsel.)

The Court: Sustain the objection.

Mr. Houts: Let the record show that the contract was offered; and I want an exception saved to the ruling.

The Court: Yes.

To which ruling of the Court, the defendant, by its counsel, then and there at the time duly excepted.

(Said document, identified as Defendant's Exhibit No. 4, is, in words and figures, as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 4

"Contract No. 5785

E. I. & T. H. Ry. Co., Southern Ry. Co., Southern Ry. Co. of Indiana

Trackage Rights Over Southern Between Oakland City and Francisco, Indiana

Jan. 11, 1922

An Agreement, made and entered into this Eleventh day of January, 1922, by and between Southern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Virginia, and Southern Railway Company of Indiana, a corporation organized and existing under and by virtue of the laws of the State [fol. 116] of Indiana, hereinafter together for convenience styled the Southern Companies, parties of the first part; and Evansville, Indianapolis & Terre Haute Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Indiana, hereinafter for convenience styled the Evansville Company, party of the second part:

Witnesseth:

That, the Parties Hereto each in consideration of the covenants, promises and undertakings of the other hereinafter expressed and contained, do hereby mutually covenant and agree as follows:

First. That the Evansville Company shall have the right, and the same is hereby granted to it by the Southern Companies, to use, jointly with the Southern Companies, and with any other railroad company or companies which may

have heretofore been admitted or may hereafter be admitted to the joint use of the same, all that certain portion of the main track of the Southern Companies, running between St. Louis and Louisville, described as follows, to-wit:

Beginning at the point, in or near the Town of Francisco, Indiana, where the spur track or branch line of railroad leading to the mines of the Francisco Mining Company connect with said main track of the Southern Companies; said point being 2732 feet, more or less, west of Milepost No. 169, on the said main track of the Southern Companies, and extending thence, in an easterly direction, a distance of thirty-seven thousand four hundred and forty-six (37,446) feet (7.09 miles), more or less to a point, in or near the City of Oakland City, Indiana, 879.6 feet east of Milespost No. 175 on the said main track of the Southern Companies; said latter point being 2120.4 feet, more or less, east of the point where the interchange track between the respective main tracks of the parties hereto connects with the said main track of the Southern Companies.

The right of joint user hereby granted contemplates and is confined to the joint use by the Evansville Company of the said portion of the main track of the Southern Companies so to be jointly used hereunder as aforesaid for the transportation and movement of such freight trains, engines and cars of the Evansville Company as may be necessary to enable it to handle the output of coal from mines to be developed by the construction and operation of the so-called Francisco Mining Company spur track or branch [fol. 117] line of railroad of the Evansville Company, which, as located and constructed, or proposed to be constructed, springs from the said main track of the Southern Companies at the point hereinbefore described and extends or will extend thence, in a general southerly direction a distance of 6600 feet, more or less, to and into the property now or formerly of Mary E. Powell, located in Section 30, Township 2 South, Range 9 West; and does not contemplate the use of any real estate (except right of way), station facilities, or any other facilities of the Southern Companies not actually necessary for the transportation of such freight trains, engines and cars of the Evansville Company. It is distinctly understood and agreed by the Evansville Company that it shall not handle any traffic

over said rails of the Southern Companies other than coal, and shall not handle coal from any other mines than those developed by the construction of the aforesaid spur track or branch line of railroad.

Second. That inasmuch as the Southern Companies themselves constructed, for the accommodation of the Evansville Company, the 150 foot connection between the said Francisco Mining Company spur track of the Evansville Company and the said main track of the Southern Companies, the Evansville Company shall reimburse the Southern Companies for the entire cost of such work, promptly upon bill rendered therefor by the Southern Companies.

Third. That the Evansville Company shall have the right, and the same is hereby granted to it by the Southern Companies to maintain the said 150 foot connection and the portion of said spur track of the Evansville Company as the same are now located and constructed upon the right of way of the Southern Companies; Provided, however, that the Evansville Company shall maintain the same at its own cost and expense and in all respects in accordance with the requirements of the Southern Companies.

Fourth. That the Southern Companies shall have control of operations on said section of their said main track to be jointly used hereunder, and shall maintain the same; shall provide for the movement of the trains, cars and engines of the Evansville Company over the said section of said main track, and to those ends shall furnish the service of such train dispatchers, operators, signalmen, trackmen and other employees as may be necessary in the premises.

Fifth. That the crews and employees of the Evansville Company, while operating trains or engines upon the said [fol. 118] track of the Southern Companies to be jointly used hereunder, shall be subject to the standard time tables and governed by such rules and regulations as may be promulgated from time to time by the Southern Companies, and shall also be amenable to the orders and instructions of the superintendent or other proper officer of the Southern Companies.

Sixth. That the Evansville Company shall pay unto the Southern Companies, in monthly settlements, on or before

the 20th day of the month following that for which bill is rendered, at the rate of Two and 50/100 Dollars ($2.50) for each and every loaded or partly loaded car transported by it over the said portion of said main track of the Southern Companies so to be jointly used hereunder, as aforesaid, or any part thereof; it being understood that no charge will be made by the Southern Companies against the Evansville Company for the movement over said main track of the Southern Companies of engines or cabooses engaged in such service or for the movement of equivalent empty cars; it is also understood that the minimum rental to be paid by the Evansville Company hereunder shall be at the rate of Two Thousand Five Hundred Dollars, ($2,500.00), per annum, for the first term of five (5) years hereby created, and at the rate of Five Thousand Dollars, ($5,000.00) per annum for the second term of five (5) years, in the event of a renewal of this agreement, as hereinafter provided.

Seventh. That in the event that it should become necessary at any time hereafter and during the life of this agreement, in the judgment of the Southern Companies to install an additional connection or interchange track, between the railroads of the parties hereto, at said Oakland City, then and in such event, the Evansville Company shall, promptly upon being notified by the Southern Companies so to do, construct and install and thereafter maintain at its own cost and expense, and in all respects in accordance with the reasonable requirements of the Southern Companies, such suitable and sufficient additional connection or interchange track between its track and that of the Southern Companies at said Oakland City as may in the judgment of the Southern Companies be necessary to meet the requirements.

Eighth. That in the event that such joint use by the Evansville Company of the said portion of said main track of the Southern Companies shall, at any time, or from time to time, hereafter, necessitate the employment by the South- [fol. 119] ern Companies of an additional operator or operators, or installation and operation of additional facilities for the purpose of handling the trains of the Evansville Company, then and in such event the Evansville Company shall reimburse the Southern Companies, monthly, promptly

upon bills rendered therefor, the amount paid by the Southern Companies to such additional operator or operators in salaries or wages, plus the expense incurred by the Southern Companies in providing and operating such additional facilities, during the month for which bill is rendered.

Ninth. That all cars handled by the Evansville Company hereunder, and the contents thereof, while upon the said track of the Southern Companies so to be jointly used hereunder, as aforesaid, shall, for the purposes of this agreement, be deemed and considered to be under the control and in the custody and care of the Evansville Company, and the Evansville Company shall carry its own insurance upon such cars and their contents, and shall assume and pay its own per diem and other expenses and collect its own demurrage and other charges on such cars.

Tenth. That the Evansville Company shall not operate or undertake to operate upon the said track of the Southern Companies an engine of greater weight than 235,000 pounds, not including tender.

Eleventh. That all cars and other equipment operated by or for account of the Evansville Company upon the said track of the Southern Companies, so to be jointly used hereunder, as aforesaid, shall at all times be kept in such condition as to pass inspection by the Southern Companies, and shall be fully equipped with the appliances provided for in the so-called Federal Safety Appliance Acts, or in any other acts or statutes, Federal or State; it being distinctly understood that the Evansville Company shall be solely responsible for the consequences of the failure on its part to so maintain and equip said cars and other equipment, and that the Southern Companies shall have the right, and the same is hereby reserved, to exclude from their track any cars or other equipment of the Evansville Company, including foreign equipment in use by it, which may not be so equipped.

Twelfth. That should said track of the Southern Companies so to be jointly used hereunder, or any part thereof, become damaged or destroyed by fire, storm or other casualty, whereby the Evansville Company should be interrupted in, or deprived of, the use thereof contemplated

under this agre-ment, or should said track, or any part [fol. 120] thereof, become obstructed by accident to trains, or accidental injury or damage to roadway or other property, whether such obstructions be directly or indirectly attributable to the sole acts, omissions or default of the Southern Companies or the Evansville Company, and in either of such cases, any loss, damage or liability should thereby accrue to the Evansville Company by interference with, interruption of, or delay in, the operation of its trains or the transportation of its freight, such loss, damage or liability shall be borne directly by the Evansville Company without liability over on the part of the Southern Companies.

Thirteenth. That the servants and employe-s of the Southern Companies while engaged or employed in or about the maintenance or care of the track so to be jointly used hereunder, or while engaged in the performance of any other service the benefit of other result of which accrues to both parties hereto jointly, shall be considered, for the purpose of this agreement, as joint employe-s of both parties hereto, and that when, under the terms of this agre-ment, it shall become the duty of any Superintendent, Train Dispatcher, Telegraph Operator or other employee of the Southern Companies to move a train, operate a switch, or perform any other service solely for the Evansville Company, such employee shall, for the purposes of this agreement, in the performance of, or omission to perform, such duty, be considered the sole employee of the Evansville Company.

Fourteenth. That the responsibility of the parties hereto as between themselves for the defense or payment of any and all claims, demands, suits, judgments or sums of money to any person or party accruing, for loss, injury or damage, howsoever caused or resulting, either of or to person or estate, and arising by reason of or in connection with the joint use by the Evansville Company of the said tracks of the Southern Companies, so to be jointly used hereunder, as aforesaid, and which may be attributable to the acts, negligence or default of any person or persons employed by either of the parties hereto, in connection with the joint use of said track, or the operation of locomotives or cars thereon, shall be assumed and disposed of by the parties hereto upon the following basis, to-wit:

(a) When the proximate cause of any such damage shall be the negligence of any one who may, at the time, be employed in the sole service and for the sole benefit of either party, hereto, or defects in the equipment in its possession, without contribution to such negligence by any employee of [fol. 121] the other party hereto, then that one of the parties hereto whose employee, as so defined, shall be at fault, or who shall have had in its possession equipment, the defects of which shall have caused the damage as above, shall be responsible for such loss or damage.

(b) When the proximate cause of any such damage shall be negligence to which employees of both parties hereto shall *be negligence to which employees of both parties hereto shall* have contributed, or the negligence of a joint employee acting simultaneously for both parties hereto, or negligence which cannot with reasonable certainty be attributable to the employees of either party hereto, then each party shall be responsible for and shall bear all loss incident to any injury to or damage of its own employees and persons upon its trains, engines or cars; all liability to any joint employee (as hereinbefore defined) or other person or corporation, not parties hereto, to be liquidated by the parties hereto in equal contribution; and should such liability be fixed in a judgment against either of such parties, the other party thus jointly responsible shall reimburse to such judgment debtor, its proportion of such judgment, together with the costs and expenses, including attorney's fees, incurred in the defense of the suit.

(c) When the proximate cause of any such damage shall be inherent defects in or negligence in the maintenance of any portion of said track jointly used hereunder, then each party shall be responsible for and shall bear all loss incident to or resulting from the derailment of or injury to its own train, engine or car, or incident to or resulting from any casualty or accident accruing in or from the operation of its own train, engine or car upon said track jointly used hereunder, in all respects as if the same had occurred upon a portion of its own line used solely by it.

(d) Each party hereto shall be solely responsible for, and shall bear all loss incident to, any injury of or damage

to its own equipment, or foreign equipment in use by it, and to its own property, or property in its custody or care, which may be caused by fire whether set out by locomotives of the other party hereto, or otherwise, however resulting, anything in this agreement contained to the contrary notwithstanding.

(e) Each party hereto, for the damage which it assumes hereunder, shall reimburse, save harmless and indemnify the other party hereto.

[fol. 122] In case any suit or action shall be brought against either party hereto for damages, the assumption and distribution of which is provided for in this fourteenth article, and the other party hereto shall be wholly or partially liable hereunder for such damages, the party against whom such suit shall be brought, shall promptly notify, in writing, the other party, and the other party shall thereupon have the right and be obligated to take part in the defense of such suit, and shall pay the judgment, and the costs, expenses and attorneys' fee incurred in the defense of the suit or a proportion thereof, according to its liability assumed hereunder.

Fifteenth. That if at any time a difference of opinion or dispute shall arise between the parties hereto, in respect of any of the provisions of this agreement, or as to their respective rights, liabilities and duties hereunder, the matter so in dispute, if it cannot be settled by the parties themselves, shall be referred to a board of arbitrators, consisting of three competent and disinterested persons, skilled in railroad operation and management, one of whom shall be selected by each of the parties hereto, and the third by the two arbitrators thus chosen. The party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the question or questions in dispute, and naming the person selected as arbitrator by the party giving such notice; and thereupon it shall become and be the duty of the other party, within fifteen (15) days after the receipt of such notice, to name an arbitrator, and in the event that the party receiving such notice fails or neglects to do so, then the party giving such notice

may select a second arbitrator, and the two thus chosen shall select a third. The Board of Arbitrators, so constituted, shall give to the parties hereto written notice of the time and place of hearing, which hearing shall not be less than twenty nor more than thirty days after the service of such notice; and at the time and place appointed the arbitrators shall proceed to the final hearing of the question or questions in dispute, unless for good cause shown, of which the arbitrators, or a majority of them, shall be the judges, such hearing shall be postponed until some later date. The determination of the Board of Arbitrators, or a majority of the members composing such board, shall be made in writing, and a report thereof delivered to each of the parties hereto within sixty (60) days from the date of the selection of the third acting arbitrator, as above provided, unless the parties hereto shall agree to enlarge the time within which such report may be so rendered and such [fol. 123] determination, when so made, shall be final and conclusive upon the parties hereto, upon the question or questions submitted to such board. All expenses attending each and every such arbitration shall be borne equally by the parties hereto.

Sixteenth. That this agreement shall take effect as of the date of these presents and shall, unless sooner terminated, as hereinafter provided, continue in effect for the full term of Five (5) Years, with the privilege to the Evansville Company of renewing the same, upon the same terms and conditions as are herein expressed and contained, except that the minimum annual rental to be paid by the Evansville Company shall be increased to Five Thousand Dollars, ($5,000.00), as hereinbefore provided, for a second term of five (5) years next ensuing from and after the date of the expiration of said first term of five (5) years; Provided, however, that it shall serve upon the Southern Companies notice in writing, of its election so to do at least ninety (90) days prior to the expiration of the said first term hereby created; and Provided Further, that either party hereto shall have the right to cancel this agreement at any time during said first term of five (5) years, or, in the event of a renewal thereof, as hereinbefore provided, then at any time during such renewal term, by serv-

ing upon the other Six (6) months' notice, in writing of the election so to do.

Seventeenth. That in the event the Evansville Company shall, at any time during the life of this agreement, default in the payment of any of the rentals or sums of money agreed by it to be paid hereunder, or shall violate any other of its covenants in this agreement contained, then and in such event the Southern Companies may thereupon, if they so elect, in addition to any other remedies accruing to them in the premises, forthwith terminate this agreement and all the rights and privileges hereby granted to the Evansville Company, and exclude the Evansville Company from further use and enjoyment of said portion of said main track.

Eighteenth. That this agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto as well as upon the parties themselves.

In Witness Whereof the parties hereto have caused these presents to be executed and their respective corporate seals to be hereunto affixed and attested by their respective of-
[fol. 124] ficers thereunto duly authorized, the day and year first above written.

Southern Railway Company, by H. W. Miller, Vice-President. Southern Railway Company of Indiana, by H. W. Miller, Vice-President. Evansville, Indianapolis and Terre Haute Railway Company, by A. H. Smith, President.

Attest: C. E. A. McCarthy, Secretary. (Seal.)
Attest: C. E. A. McCarthy, Secretary. P. H. B. S. V. (Seal.)
Attest: E. F. Stephenson, Secretary. (Seal.)

Approved: John T. Beasley, General Counsel."

Attached to said contract is a blue print, a copy of which next follows:

(Here follows drawing, side folios 125 and 126)

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[fols. 127 & 128] Mr. Houts: Now, I want to offer in evidence, Defendant's Exhibits Nos. 1 and 2. They are the photographs. Those, Gentlemen (addressing the jury), I imagine you have seen them, but you know what they are, anyhow.

(Said photographs, identified as Defendant's Exhibit Nos. 1 and 2, are as per copies next following:

(Here follow Defendant's Exhibits Nos. 1 and 2, side folios 129-130 and 131-132)

[fols. 133 & 134] Mr. Houts: I want to offer in evidence that piece of paper on which Mr. Veith made a drawing of the crank, and it is marked "Defendant's Exhibit No. 3".

(Said pencil drawing is as per copy traced from the original by the reporter, and which next follows:)

(Here follows drawing, side folios 135 and 136)

[fol. 137] Mr. Houts: I want to offer in evidence also the Indiana Statutes, which are set out in the answer. Mr. Eagleton said he would not require me to produce the books. He does not dispute the correctness of those Statutes, as they are set out in the answer.

Mr. Eagleton: I understand that all sections of the Statutes of Indiana there set out in defendant's answer are hereby offered in evidence, and with no exception on the part of plaintiff, and no dispute as to their authenticity.

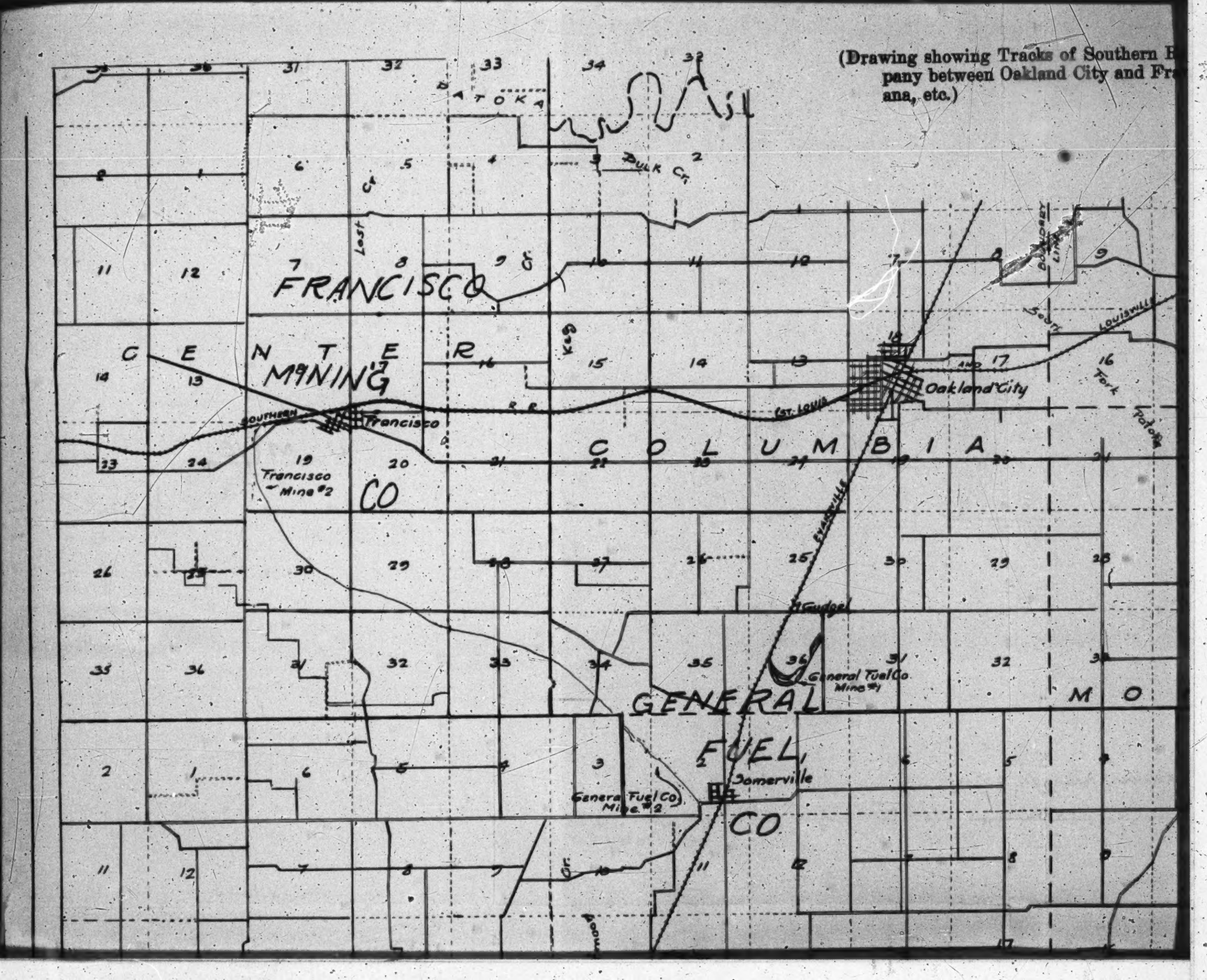
Mr. Houts: That is all. Doctor Clopton is out of town and did not get here, so I cannot offer him as a witness, and so with that statement, I will close the defendant's case.

Defendant rests.

The Court: Have you any rebuttal, Mr. Eagleton?

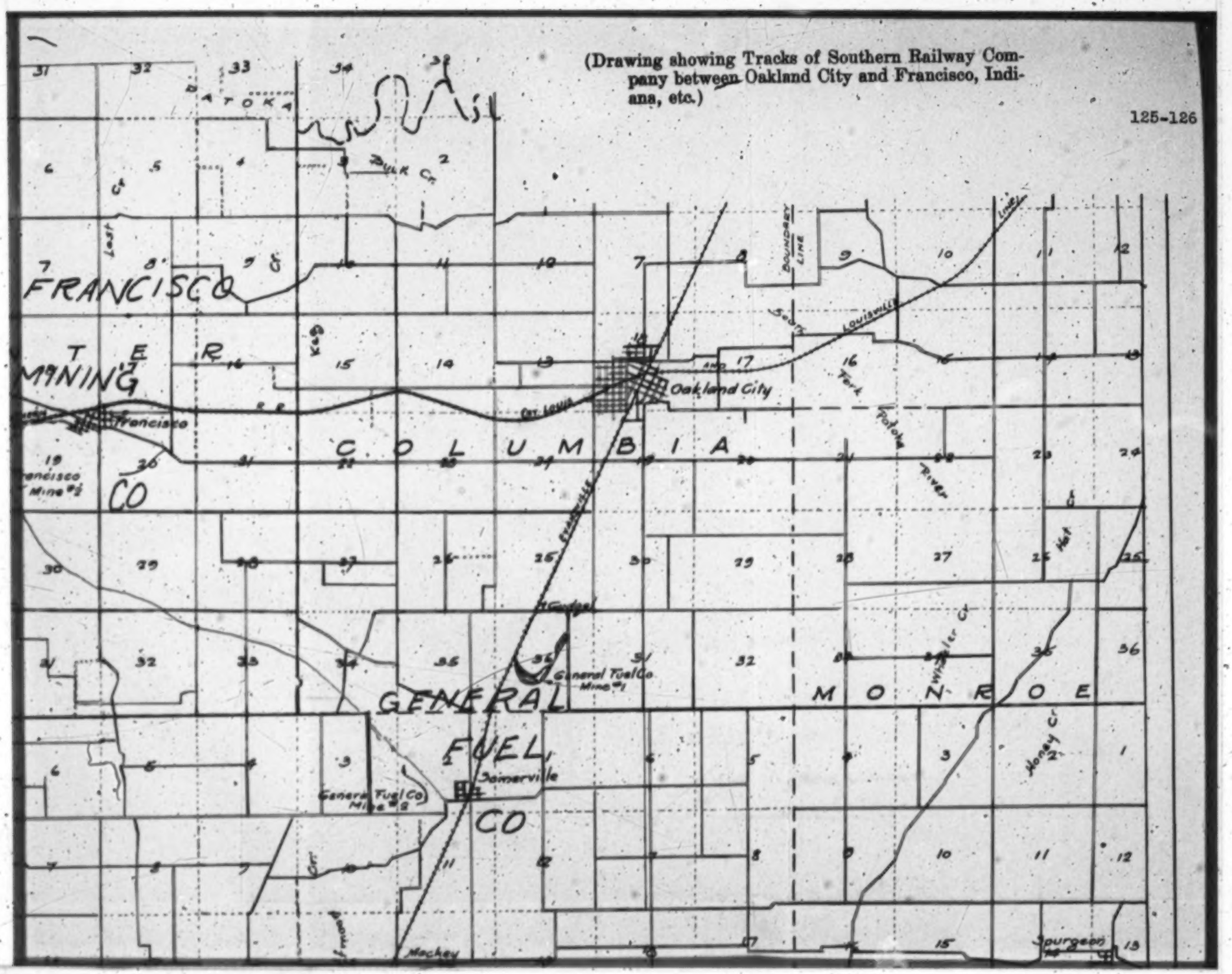
Mr. Eagleton: No rebuttal, if the Court please.

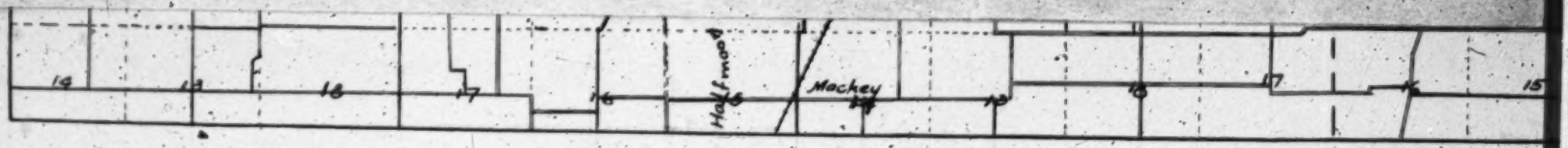
Which was all of the evidence offered in the case.


(Drawing showing Tracks of Southern R
pany between Oakland City and Fra
ana, etc.)
DATOKA
BULK CR
Lost Cr
FRANCISCO
CENTER
MINING
Big Cr
Oakland City
ST. LOUIS
SOUTHERN
Francisco
Francisco Mine #2
CO
COLUMBIA
Fork
Patoka
EVANSVILLE
Gudgel
General Fuel Co Mine #1
GENERAL
FUEL
Somerville
General Fuel Co Mine #2
CO
MO

(Drawing showing Tracks of Southern Railway Company between Oakland City and Francisco, Indiana, etc.)

125-126






E. I & T. H.

SOUTHERN RY. BETWEEN OAKLAND CI

Office of Chief Engineer

Scale 1/62500

E. I & T. H. RY.

SOUTHERN RY. BETWEEN OAKLAND CITY AND FRANCISCO IND.

Office of Chief Engineer — Cin. Ohio

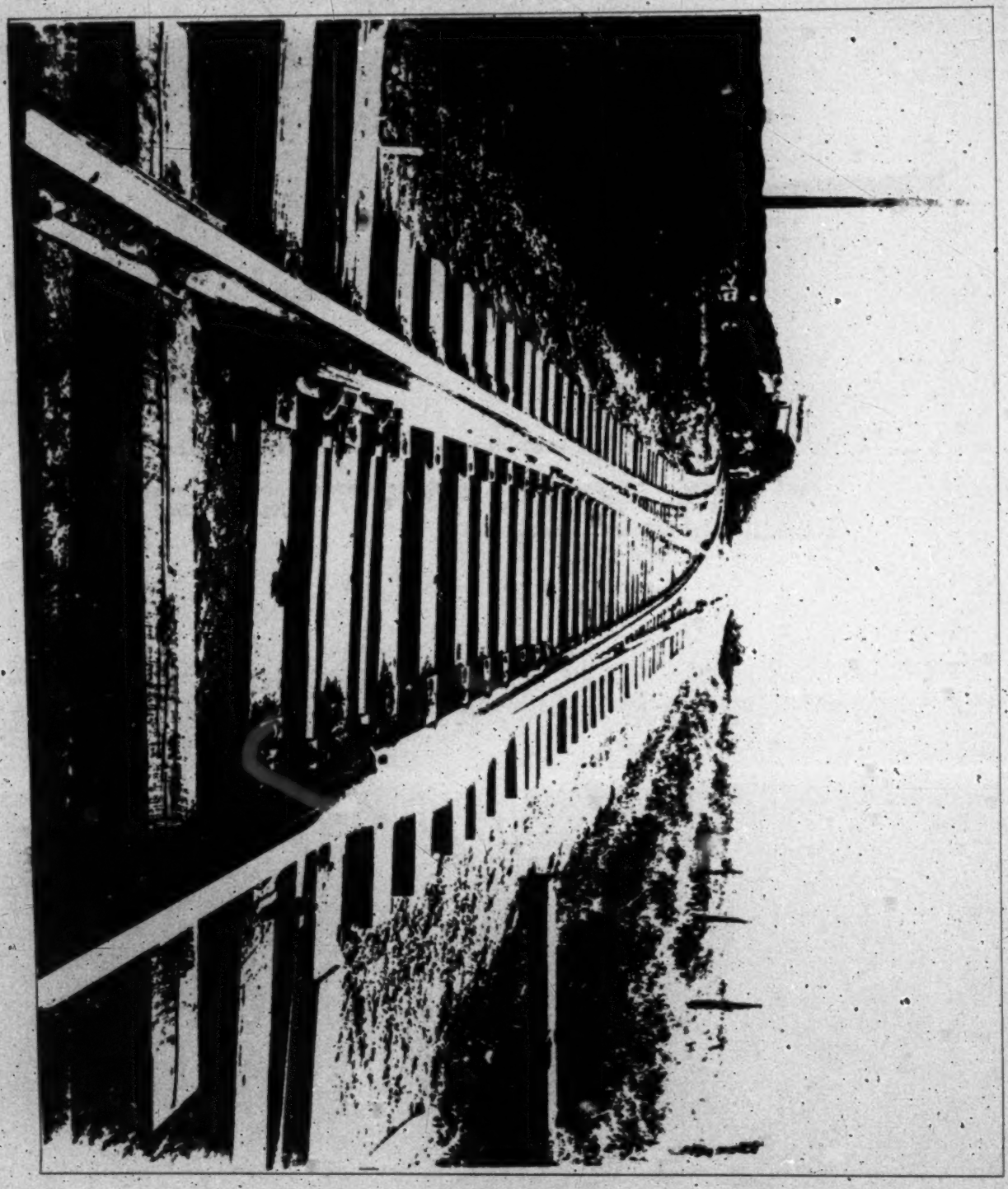
Scale 1/62500 — April 22-1922

PLAN No 19541

FILE No 533-188

DEFENDANT'S EXHIBIT NO. 1

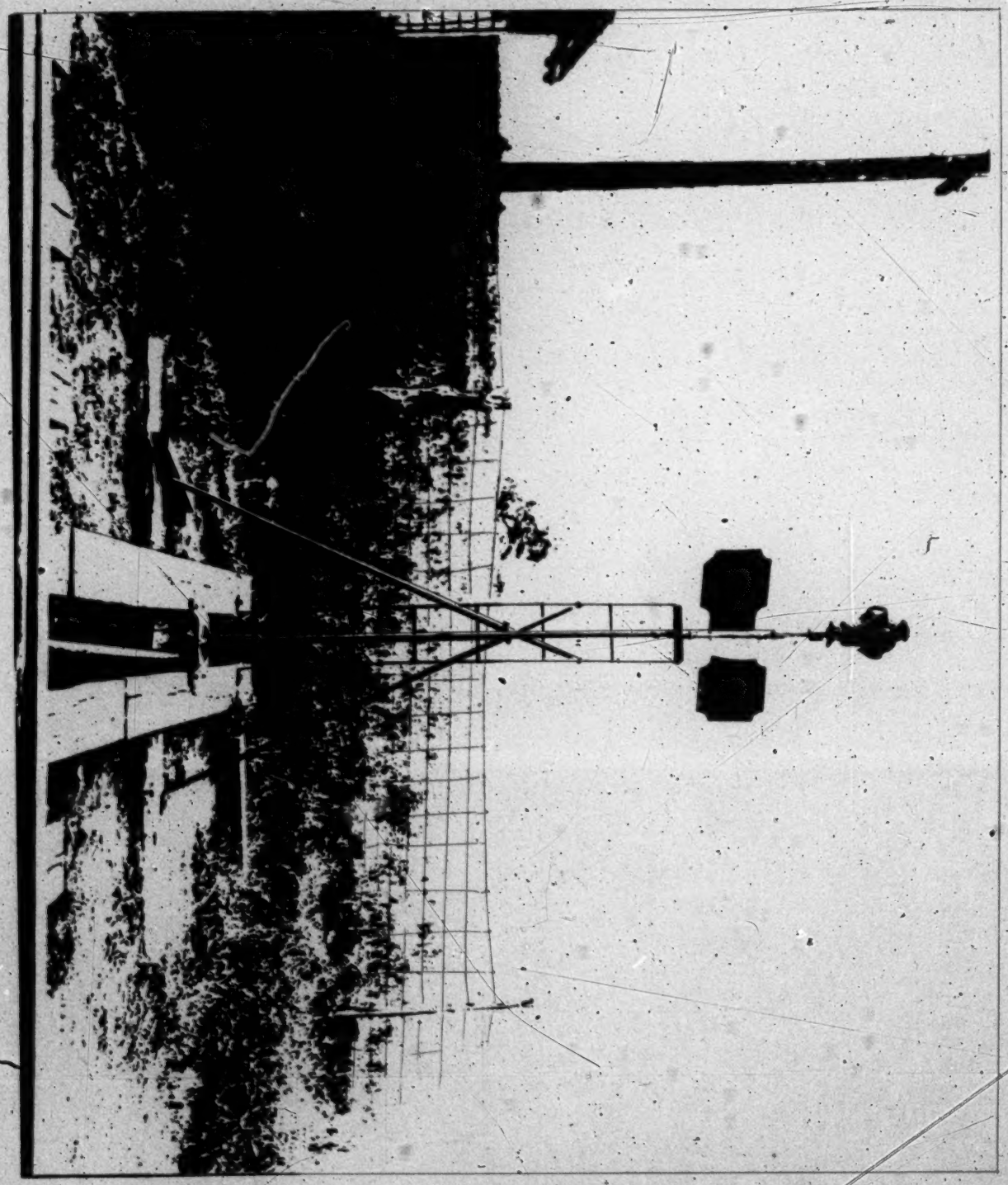
129-130



I2 feet east of switch looking west showing switch post; camera located in center of main track.
Negative made September 3d at 5 o'clock P.M.Lense 4 feet 6 inches high.

C.A.Shatert

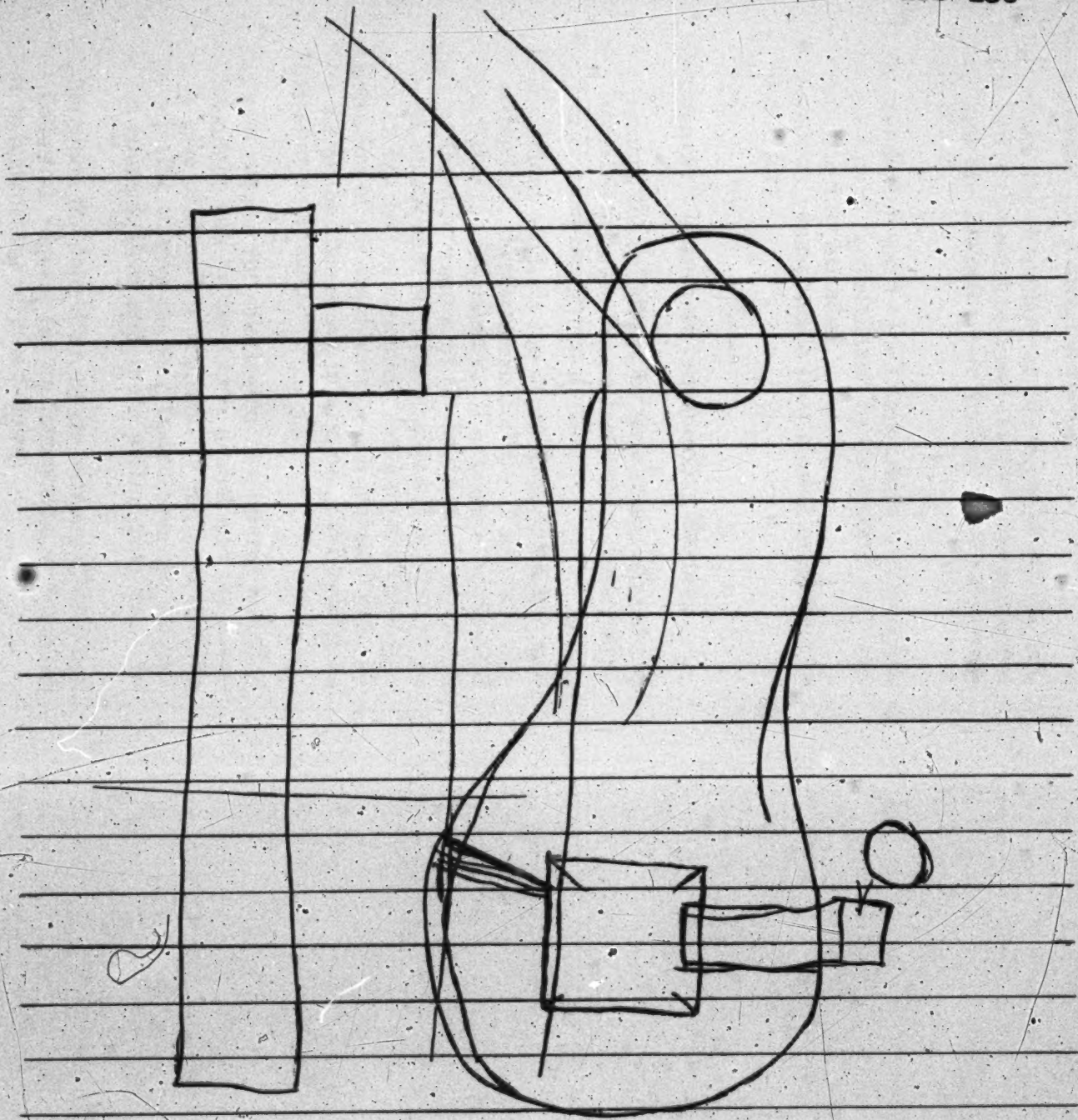
DEFENDANT'S EXHIBIT NO. 2 131-132



Showing switch stand and switch, camera located width of main track.
Negative made September 3d at 5 o'clock P.M. Lense 4 feet 6 inches high.

T. A. Blanchard

DEFENDANT'S EXHIBIT NO. 3 135-136



DEFENDANT'S MOTION FOR DIRECTED VERDICT

And thereupon the defendant, by its counsel, offered the following request for a directed verdict:

"Now comes the defendant at the close of all the evidence and moves the court to direct the jury that under the pleadings and the evidence their finding must be for the defendant."

Which said motion was by the Court denied, and to which action of the Court, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon, counsel made their closing arguments to the Court and jury.

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DEFENDANT'S REQUESTED INSTRUCTIONS REFUSED

And thereupon, the defendant, by its counsel, offered and filed the following request for an instruction, and prayed the Court to instruct the jury as follows:

"The defendant requests the court to instruct the jury that the defendant, the Southern Railway Company, cannot be held liable for the damages, if any, that the plaintiff may have suffered by reason of the collision mentioned in the evidence, unless such collision was due to negligence on its part, or on the part of its agents, servants and employe-s in the operation of the train upon which plaintiff was rid-
[fol. 138] ing at the time of his injury, or in the care of its track and other equipment."

Which said request for said instruction offered and filed by the defendant was by the Court denied and the Court refused to give said instruction, and to the action of the Court in refusing to give the said instruction, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon the defendant, by its counsel, offered and filed the following request for an instruction, and prayed the Court to instruct the jury as follows:

"The defendant moves the court to instruct the jury that if they believe and find from the evidence that the collision

mentioned in the evidence was due to the fact that the signal light at the switch was set so as to indicate that the defendant's train should proceed past said switch; and if the jury further find and believe from the evidence that the switch was so set as to deflect defendant's train to the track of the Evansville, Indianapolis & Terre Haute Railway Company; and if the jury further find from the evidence that the incorrect position of said signal light was due to the throw rod having become detached from the upright upon which the signal light was fastened; and if the jury further find and believe from the evidence that the throw rod had so become detached because of a recent break in the crank which connected it with the upright support of the signal light; and if the jury further find and believe from the evidence that defendant's employe-s used due and reasonable care under the circumstances to inspect said signal light and its connections, and that by such due and reasonable care they were not able to discover any defect in said signal light and in its connections in time to have repaired it or to warn defendant's employees in charge of said train of its defective condition and the improper setting of said signal light, then it is the jury's duty to find the defendant not guilty of any negligence which could have caused the collision and plaintiff's injury."

Which said request for said instruction offered and filed by the defendant was by the Court denied and the Court refused to give said instruction, and to the action of the Court in refusing to give the said instruction, the defendant, by its counsel, then and there at the time duly excepted.

And thereupon the defendant, by its counsel, offered and filed the following request for an instruction, and prayed the Court to instruct the jury as follows:

[fol. 139] "The defendant requests the Court to instruct the jury that if it finds and believes from the evidence that the collision referred to in the evidence was caused solely by the negligence of the employees of the Evansville, Indianapolis & Terre Haute Railway Company; and if the jury finds that such negligence of the employe-s of the Evansville, Indianapolic & Terre Haute Railway Company was in their failure to install and maintain in a safe condi-

tion the switch, track and signal devices at or near where the collision occurred; and if the jury find and believe from the evidence that such switches and signal devices were installed and maintained for the purpose of connecting the track of the Evansville, Indianapolis & Terre Haute Railway Company with that of the defendant Southern Railway Company; and if the jury find and believe from the evidence that said switches and signal equipment was installed and maintained under a contract between the Southern Railway Company and the Evansville, Indianapolis & Terre Haute Railway Company, by the terms of which it was the duty of the Evansville, Indianapolis & Terre Haute Railway Company to maintain said switches and signal devices in a safe condition; and if the jury find and believe from the evidence that the Evansville, Indianapolis & Terre Haute Railway Company was a railroad corporation organized under the laws of the State of Indiana, and that the laws of the State of Indiana expressly permitted the defendant and said Evansville, Indianapolis & Terre Haute Railway Company to enter into such a contract, then it will be the duty of the jury to return a verdict herein for the defendant."

Which said request for said instruction offered and filed by the defendant was by the Court denied and the Court refused to give said instruction, and to the action of the Court in refusing to give the said instruction, the defendant, by its counsel, then and there at the time duly excepted.

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CHARGE TO JURY

And thereupon the Court charged the jury as follows:

The Court's Charge to the Jury

The COURT: Gentlemen of the Jury, you have now heard the evidence in the case and have listened to the argument of counsel, and it is about time for you to take the case and deliberate upon it. Before doing so, it is customary for the Court to tell you some of the principles of law that should govern you in your consideration of the case, and,

[fol. 140] of course, you are expected to accept the Court's statement of the law and be governed by it, in determining the issues here. All questions of fact and the credibility of witnesses are for the jury, and the Court will not undertake to influence you in that respect, and you would not be obliged to follow the Court's opinion with reference to those things, even if it did undertake to state its opinion to you, which it will not.

This is a case, as you know, in which the plaintiff asserts that he is entitled to recover damages because he has suffered an injury by reason of the negligence of the defendant. The mere happening of an accident, without negligence, does not give the plaintiff any right to recover damages; he is entitled to recover when it is established that his injury, if he has an injury, has resulted to him by reason of the negligence of the defendant.

A good many of the facts in the case are not disputed at all: the defendant was a common carrier engaged in carrying passengers and property for hire: the defendant was a passenger on one of its trains, taking passage at Louisville, and I think the testimony was that his destination was St. Louis; but that is not important; it is conceded that the plaintiff was a passenger upon its train; and it is conceded that this train left the main track and entered an open switch, and struck an engine and train of cars on a siding: no dispute about those points in the case.

Now, the trains don't ordinarily collide with each other, and in this case there was a collision; and you would be justified, from the fact that there was a collision, you would be justified in assuming that this collision resulted from the negligence of someone. The proof of the collision and the proof of the injury, if there has been any such, would warrant you in returning a verdict for the plaintiff, unless you have been satisfied by the evidence in the case that the collision resulted from some cause other than negligence of the defendant.

It was the duty of the defendant, the Southern Railway Company, to exercise the highest degree of care practicable, not only in the management of its locomotives, but in the maintenance of its entire equipment; and by the term "highest degree of care" is meant that degree of care which a very prudent carrier would have exercised under the same or similar circumstances; and the failure to exer-

cise such highest degree of care as was practicable con-
[fol. 141] stitutes negligence in the sense in which that term is used in these instructions.

The Court further charges you, as a matter of law, that under the circumstances in evidence, the Southern Railway Company is responsible for the negligent acts, if any, on the part of the servants of the Evansville, Indianapolis and Terre Haute Railroad Company in the operation of the switch mentioned in evidence; and in addition to this responsibility, the Court charges you that the Southern Railway Company is responsible for the negligent acts, if any, of its own agents and servants; therefore, if you find from the evidence that the plaintiff was injured as a direct result of negligence on the part of the servants of the Evansville, Indianapolis and Terre Haute Railway Company, in the operation of the switch mentioned in evidence, or the plaintiff was injured as a direct result of negligence on the part of the servants of the Southern Railway Company, then in either or both of such events, if you so find, your verdict should be in favor of the plaintiff and against the defendant, the Southern Railway Company.

Considerable evidence in the case has been offered with reference to the switch and the signal light stationed at that point. Now, if you believe that the employe-s of these two companies that the Court has mentioned exercised the highest degree of care in the placing of this switch light there and in the maintenance of it, and in the operation of it, and that it suddenly became out of condition by reason of a recent break, and that, notwithstanding the companies concerned and their employe-s have exercised that degree of care which the law imposes upon them, this collision resulted, and that this defect appearing in the switch light or the break occurring therein was the sole cause of this collision, then you would not be justified in finding for the plaintiff. I mean to say by that, that if the employees of these concerns exercised their full duty with reference to this switch light, and that they were not guilty of any negligence in connection therewith, but that the same became defective, and that this was the sole cause of the collision, then you would not be justified in finding for the plaintiff. That is the issue in the case, about as well as I can qnote it to you.

If, after you have considered the case, you decide to return a verdict for the plaintiff, then you will be called upon to determine the amount of damages which you feel that he is entitled to recover. In connection therewith, you [fol. 142] may consider these things: you are entitled to consider the pain and suffering that the plaintiff has endured, if any, and the pain and suffering which you believe from the evidence he is reasonably certain to endure in the future: you are entitled to consider the nature and extent of his injuries, whether they are temporary or whether they are permanent: you may consider the sums that he has expended (I believe, however, there is no evidence that he has expended any sum), but you are entitled to consider the sums that he has contracted to expend, if any, for medical services and attention: and with these things in mind, you should, if you find for plaintiff, allow him such a sum as you think will reasonably and fairly compensate him for his injuries.

The credibility of the witnesses is for the jury. You have seen the witnesses and heard them testify; you know their interest in this case, if they have any, either on behalf of the plaintiff or on behalf of the defendant; you may consider their interest, if they have any, in determining the weight you are going to give to their testimony; you may consider the manner in which they have delivered their stories and the manner in which they have testified, and give to the witnesses such weight as you think they are justly entitled to. Some medical witnesses have appeared here and have expressed opinions on certain subjects. The mere fact that these parties are held out as experts does not mean that you are obliged to accept their statements. You should give attention to them, compare them and give to them such weight as you think they are entitled to.

The verdict that you reach must be unanimous; you must all concur in it. After you have agreed upon a verdict, designate your foreman to execute it for you.

(Addressing counsel:) I have nothing more to say to the jury, Gentlemen. You may save your exceptions. I have marked some instructions refused.

### Plaintiff's Exceptions to the Court's Charge

Mr. Eagleton: The plaintiff excepts to that charge of the Court which refers to the maintenance and operation

or condition of the signal light being the sole cause, because there is no evidence to base it on, and asks the Court to charge in that connection that—defendant's duty applied as much to the switch as to the signal light, because the two are operated together, and by referring to the signal light alone, it might lead the jury to believe that the de- [fol. 143] defendant's full duty was discharged by keeping the signal light in condition, when as a matter of fact the servants of the defendants, in addition to maintaining the signal light in proper condition, should have likewise used the highest degree of care to see that the switch was in fact closed, irrespective of the signal light.

Defendant's Exceptions to the Court's Charge

Mr. Houts: Defendant excepts to that part of the charge which instructed the jury that defendant, Southern Railway Company, was responsible for negligence of the employees of the Evansville, Indianapolis and Terre Haute Railway Company.

The defendant further excepts to the refusal of the Court to giving the peremptory instruction which was offered at the close of all of the evidence, and also the failure of the Court to give the instructions which were offered by the defendant and were marked "refused" by the Court.

The Court (addressing the jury): You may retire, Gentlemen, to consider of your verdict.

Mr. Eagleton: Except to failure of the Court to charge as asked.

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And thereafter, at the conclusion of all the evidence in the case, the arguments of counsel, and the giving of the charge by the Court to the jury, the jury retired to their jury room to consider of their verdict.

VERDICT

And thereafter, to-wit, on the 13th day of November, 1928, the jury returned their verdict, in words and figures, as follows:

"UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID DIVISION OF SAID DISTRICT

No. 8124. At Law

JACK W. HUSSEY, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

Verdict

We, the jury in the above entitled cause, find the issues herein joined in favor of plaintiff, Jack W. Hussey, and [fol. 144] against defendant, Southern Railway Company, a corporation, and assess the damages of said plaintiff in the sum of Twenty Thousand 00/100 Dollars ($20,000.00).

November 13, 1928.

H. E. Lipe, Foreman."

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And, thereafter, to-wit, on the 16th day of November, 1928, the defendant, by its counsel, filed its motion to set aside the verdict and grant a new trial, which said motion is, in words and figures, as follows, to-wit:

DEFENDANT'S MOTION FOR NEW TRIAL

Now comes the Southern Railway Company, a corporation, defendant in the above entitled cause and prays the Court to set aside the verdict returned by the jury in said cause and to grant a new trial for the following reasons:

1. The amount of damages assessed by the jury in said cause is excessive.

2. The amount of damages assessed by the jury is so grossly excessive as to evidence bias and prejudice on the part of the jury in favor of the plaintiff against the defendant.

3. The verdict is not supported by any evidence.

4. The Court erred in refusing to give defendant's instruction in the nature of a demurrer to the evidence.

5. The Court erred in not giving each and every one of defendant's other instructions which were offered and were refused by the Court.

6. The Court admitted incompetent, irrelevant and immaterial evidence over the objection and exception of the defendant.

7. The Court erred in permitting, over defendant's objections, plaintiff's counsel to interrogate defendant's witness Vieth about statements claimed to have been made to said witness by other persons present shortly after the collision referred to in the petition and in the evidence, plaintiff's counsel at the time holding in his hand, from which he appeared to be reading, statements of such other persons, which questions and the manner in which they were asked, and the apparent fact that plaintiff's counsel was reading from written statements of such persons, tended to discredit said witness and enabled plaintiff's counsel to [fol. 145] get before the jury in an indirect manner what appeared to be statements of such other persons concerning the cause of the collision, which statements were incompetent and which could not have been directly introduced in evidence.

8. The Court erred in excluding competent, material and relevant evidence offered by defendant, and particularly the contract between the defendant and the Evansville, Indianapolis & Terre Haute Railway Company, covering the installation and maintenance of the switch and signal lights at the point where the collision occurred.

9. The Court erred in instructing the jury that the defendant Southern Railway Company was liable for the negligent acts of the employe-s of the Evansville, Indianapolis & Terre Haute Railway Company.

10. The verdict was against the evidence.

11. The verdict was against the weight of the evidence.

12. The verdict was against the law and the evidence.

13. The verdict should have been for the defendant.

Charles A. Houts, Sam. B. McPhetters, Attorneys for Defendant."

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Which said motion for new trial was overruled by the Court, and the Court, in overruling the said motion for a new trial, filed its memorandum on defendant's motion for a new trial, on June 17, 1929, which said memorandum is, in words and figures, as follows, to-wit:

OPINION ON DEFENDANT'S MOTION FOR NEW TRIAL

Plaintiff was a passenger on defendant's train from Louisville, Kentucky, to St. Louis, Missouri. At Mine Junction, Indiana, the train collided with a train of the Evansville, Indianapolis and Terre Haute Railroad Company, which was standing on a siding. The tracks of the Evansville, Indianapolis & Terre Haute Railroad Company connected with the tracks of the defendant company at Oakland City, Indiana, from which point to Mine Junction the trains of the Evansville, Indianapolis & Terre Haute Railroad Company run over the tracks of defendant to Mine Junction. The defendant company by contract granted the Evansville, Indianapolis & Terre Haute Railroad Company this privilege acting under authority of Section 13206, 13207, and 13208 of the statutes of Indiana. [fol. 146] The collision occurred in the night time. Immediately prior to the collision a train of the Evansville, Indianapolis & Terre Haute Company came to Mine Junction, and stopped prior to entering upon the tracks of the defendant. The brakeman of the Evansville, Indianapolis & Terre Haute Company opened the switch but after the engineer of the train said that they did not have time to make Oakland City, the train did not enter upon defendant's tracks. The switch remained open and defendant's train left the main track, ran on to the siding and collided with the standing train.

The case was submitted to the jury and a verdict for $20,000 was returned for the plaintiff. The case was given to the jury on the theory that the employees of the Evansville, Indianapolis & Terre Haute Company were, for the purpose of this case, to be regarded as the agents of the defendant.

The defendant in support of its motion for a new trial contends that it is not liable for the acts of the Evansville, Indianapolis & Terre Haute Railroad Company because the statute of Indiana authorized it to lease the use of its road to that company. Having statutory authority to make the lease, the lessor was not liable for the negligent acts of the lessee.

The Statute of Indiana did authorize the railroad to grant authority to other roads to use its tracks. The statute further provides that a lessee shall be liable to third persons for damages done by its trains in the same manner and to the same extent as though it owned the road. There is nothing in the Indiana statute, as we see it, which releases a lessor road from the ordinary obligations of a carrier. It is true that this statute, unlike the statute of some of the states, does not provide that the lessor shall remain liable for all damages inflicted on its lines regardless of whether caused by the lessee or by the lessor. The statute neither adds to nor withdraws from railroads jointly using the same track the ordinary duties imposed by the law upon carriers of passengers.

The defendant has cited a number of cases to the effect that the lessor road is not liable for damages inflicted as a result of the negligence of the employees of a lessee road. The early case of Arrowsmith vs. Railroad, 57 Fed. 165, has been followed in subsequent cases cited. This case holds that where a railroad company leases its road by authority of law, the lessor is not liable for injuries to a passenger traveling under contract with the lessee when such injuries are caused wholly by the lessee's negligence in [fol. 147] operating the road. Other cases cited by the plaintiff, such as Moorehead vs. United Railway Co., 119 Mo. Appeals, 541 same case, 203 Mo. 121, present a state of facts showing that the lessor surrendered under contract to its lessee the complete control of the road. Under these circumstances it was decided that the lessor was not liable for the acts of the lessee. This is not the state of facts

that we have in the case at bar where the two roads were jointly engaged in using the tracks at the point where plaintiff's injuries occurred, and the doctrine of these cases is not controlling in the case here under consideration.

The plaintiff in this case was defendant's passenger, and, thereby, is entitled to all of the rights which the law accords to one in that relation. The defendant was obligated to exercise a high degree of care to safely transport the plaintiff in accordance with the contract. This fact must not be lost sight of in the present case. The plaintiff was injured in a collision between the train on which he was riding and the train of another company. We are urged to say that the negligence which caused the accident was that of the employees of the Evansville road, and that the cause of action, if any, should be pressed against that company.

There is authority in this circuit for holding that the carrier guilty of negligence, is liable to a passenger being transported on the train of another road. Eddy vs. Letscher, 57 Fed. 115. But that case does not hold that the carrier of the passenger was not also liable. To so decide is to treat lightly the relationship existing between the plaintiff and the defendant. The situation here existing is somewhat like the duty which a railroad company owes to a passenger riding in a sleeping car. The carrier is universally regarded as liable for the negligent acts of the employees of a sleeping car company whose coaches are being transported. Pennsylvania Company vs. Roy, 102 Y. S. 451. A case of a different character governed by the same principle is Mahoney vs. K. C. Rys. Co. (Mo.) 254 S. W. 16.

A case illustrating the principle referred to above, and one identical, as we see it, to the case at bar, Harris vs. Union Pacific, arose in this circuit, 63 Fed. 800, and ultimately reached the Supreme Court, and is reported in 158 U. S. 326. In that case some freight cars were delivered to a mining company which had control of a side track. These cars were permitted to run off of the side track on to the main track where a collision occurred and a passenger injured. The trial court's instructions to the jury, that the [fol. 148] act of negligence of the servants of the mining company is to be ascribed to the defendant, was approved in both appellate courts. A similar ruling was made in

Dunn vs. The Pacific Railroad Co., 71 N. J. L. 25; 58 Atl. 165.

Judge Treat in this court, in Keep vs. Indianapolis & St. Louis R. R. Co., 10 Fed. 454, held that one who bought a ticket to St. Louis was entitled to recover from carrier for injury caused by another company in transporting him across the bridge at St. Louis.

This evidence shows that defendant had granted another road permission to enter upon its tracks at the switch in question, and to jointly use the tracks. The defendant was charged with the duty of exercising a high degree of care in maintaining its track at this as well as at all other places. The defendant might have opened and closed the switch itself, but, no doubt for good reason, it delegated that duty to its lessee. The servants of the lessee, knowing that defendant's train would presently approach, opened the switch, stood idly by, and permitted the train to leave the main track and collide with the freight train on the siding.

Under these circumstances the defendant, as against this plaintiff, its passenger, cannot assert that the negligence of the lessee is not its negligence.

The doctrine of the above cases, it seems to us, was properly applied in the case at bar, and the motion for a new trial should be overruled.

Chas. B. Davis, U. S. District Judge.

To which action of the Court, in overruling its said motion for a new trial, the defendant, by its counsel, then and there at the time duly excepted, and was allowed until ——, 1929, in which to file its bill of exceptions.

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IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

Forasmuch, as said matters do not appear of record herein, the defendant has prepared and now presents this, its bill of exceptions, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done, on this 17th day of September, A. D. 1929.

Charles B. Davis, Judge Eastern Division of the Eastern Judicial District of Missouri. (Seal.)

[fol. 149] The foregoing bill of exceptions has been examined and is hereby approved and agreed to by

Jesse W. Barrett, Ellison A. Poulton, and Mark D. Eagleton, Attorneys for Plaintiff. Sam B. McPheeters, Charles A. Houts, Attorneys for Defendant.

9/16/29.

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Clerk's certificate to foregoing transcript omitted in printing.

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[fols. 150 & 151] Appearances of counsel omitted in printing.

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[fol. 152] Minute entries of argument and submission May 5 and 6, 1930, omitted in printing.

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[fol. 153] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, A. D. 1930

No. 871

SOUTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

JACK W. HUSSEY, Appellee

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. Charles A. Houts (Mr. Samuel B. McPheeters and Mr. H. N. Quigley were with him on the brief) for appellant.

Mr. William H. Allen (Mr. Jesse W. Barrett, Mr. Ellison A. Poulton, and Mr. Mark D. Eagleton were with him on the brief) for appellee.

Before Stone and Van Valkenburgh, Circuit Judges, and Otis, District Judge

OPINION—Filed June 26, 1930

STONE, Circuit Judge, delivered the opinion of the court.

This is an appeal from a judgment for personal injuries. Appellee received the injuries while a passenger on ap-

pellant's train through a collision between that train and a freight train of the E. I. & T. H. Railroad Company, caused by an open switch leading off from appellant's main line to the track of the other railroad on which the freight train was standing.

[fol. 154] There was a contract between the two roads under which the Evansville Road constructed and maintained the switch and was permitted to run its trains four or five miles from the switch along the main line of appellant to a nearby town. Such a contract was authorized by the statutes of Indiana, where the switch was located.

The action was formed on the theory of res ipsa loquitur. Appellant answered that it was the duty of the Evansville Road to install and maintain the switch and connected signal light and that such were being so maintained at the time of the accident; that appellant's train approached the switch at night with the switch signal light indicating a safe track but that in fact the switch was turned; that through some defect or insufficiency in the signal light and the controlling mechanism, the light failed to truthfully disclose the open switch to defendant's engineer and that such unsafe condition could not have been discovered by its agent in charge of the train.

The undisputed facts are that appellee was a passenger on a west-bound passenger train of appellant. Near Princeton, Indiana, the line of the Evansville, Indianapolis & Terre Haute Railway Company connected with the main line of appellant by a switch. This switch was installed and maintained by the Evansville company under a contract requiring such and permitting use by that company of a few miles of this main line from the switch to a nearby town. This switch was equipped with a signal post which designated when the switch was open or closed. The post was connected with the switch so that it would co-operate. The switch was operated by a lever on the opposite side of the main line and on the side where the Evansville track entered. The train struck the open switch and collided with the Evansville train standing on the connecting track.

A bare outline of appellant's evidence of how the accident happened is as follows. After midnight, a freight train of the Evansville company stopped in the neighborhood of the switch. The conductor and two brakemen went to the switch, near which was a telephone booth, from

which the conductor called the station agent to ascertain if he could safely enter and proceed on appellant's main line to the nearby town. Receiving favorable information he instructed one of the brakemen to throw the switch. Thereafter, he sent that brakeman to the engineer to see if he [fol. 155] could safely attempt the trip. The engineer though he could not and the brakeman returned and so reported to the conductor. They noticed the signal showed the green light for the main line—indicating a closed switch. Neither the conductor nor either of the brakemen examined the switch nor closed it but sat down near it to await the passage of appellant's train. After the accident the signal was examined and it was found that a lug connecting the switch rod with the bottom of the signal post had fallen off. The bottom of the post was square and the lug fitted over it with a set screw. There was no countersink in the post for the screw but it could be screwed against the post. There was a new crack in the lug. The screw was rusted in place. The screw was all that prevented the lug dropping off. A freight train had passed along the main line shortly before. Appellant had inspected the switch shortly before. There was a conflict as to whether this method of attaching the lug was standard. If a bolt hole had been made in the bottom of the post a bolt could have been screwed in and prevented the lug falling.

Appellant presents here four propositions, one of which (excessive damages) is not open for consideration (Public Utilities Corporation v. McNaughton, 39 Fed. (2d) 7, this court).

I

Appellant contends that if the accident occurred through the negligence of the Evansville Road in leaving the switch open, appellant could not be held liable therefor. It seeks to argue the case on the basis of the absence of responsibility of a railroad lessor for the acts of its lessee. There are a number of cases bearing on the liability of two railroads which have contracts with each other involving the maintenance and/or operation of a designated property. These cases, at first glance, seem to be and in some instances are in conflict, or, at least, in confusion. The confusion in the cases seems to have arisen from the difficulty of laying down an all inclusive rule which can apply to the facts and circumstances of all cases. There are various

considerations which may intrude and govern the particular case. Some of these are: whether there is legislative authority for the contract; the nature of the contract (that is, a complete lease of all operation, maintenance and control, a mere running right; a partial control, etc.); the nature of the occurrence or condition causing the accident; the relation of the injured person to the lessor or lessee, [fol. 156] and possibly other considerations. However, one thing is beyond dispute. That is, that if the lessor carrier owes a clear legal duty to the person injured, that duty cannot be avoided or lessened by any arrangement which that carrier may make with any other person. If any part of that duty is delegated to another then that other becomes the agent of the carrier, in that respect, and the carrier is responsible for its acts.

Here, the appellant owed the appellant the duty of exercising the highest degree of care in transporting him. That care applied to everything which might affect that safe transportation, including the maintenance and operation of all appliances having to do therewith. It is clear that this accident happened in connection with this switch—either because of defective appliance or because of the operation of that appliance by the railroad given, by appellant, the right to operate it. The duty of the appellant toward its passengers was to use the highest degree of care to keep that switch safe for the transportation of such passengers over it. Neither as to the maintenance nor as to the use of that switch, can the appellant avoid this duty of care. It cannot delegate the duty of maintaining a proper switch appliance so as to lessen its duty in that regard. Equally, it cannot delegate the operation of that appliance so as to lessen its duty.

The case of Ill. Cent. R. R. v. Barron, 5 Wall. 90, is directly in point and determines this contention adversely to appellant. In that case, there was a running agreement and, as here, a passenger was injured because of the operation of the other road thereunder. Therein, the court said, very shortly, that the matter had been settled "in the courts of Illinois" and further said "and we think rightly". Also, it said: "The same principle has been affirmed in other States". The court referred to three Illinois decisions (St. Paul R. R. Co. v. McCarthy, 20 Ill. 385; Ohio, etc. R. R. Co. v. Dunbar, 20 Ill. 623; Chicago & R. I.

R. R. Co. v. Whipple, 22 Ill. 105) and two decisions from other States (Nelson v. R. R., 26 Vt. 717; McElroy v. R. R., 4 Cush. (Mass.) 400). Appellant contends that this decision was one merely following the State law; that there being no State statute permitting leases of its line by carrier such a lease was void and had no effect upon the liability of the lessor. This view, however, leaves out of con- [fol. 157] sideration the expression in the opinion: "and we think rightly". To avoid this language of approval, appellant contends that such goes no further than approval of the reason for the Illinois decision and that such reason was that the contract with the other carrier had been made without legislative consent, citing the Dunbar case. It is true that the Dunbar case so holds. In that case the railroad had leased its entire road and equipment to another, free from all control, and it was in operation by the lessee that a live stock shipment was damaged by delay. The only reason or ground for holding the lessor was as stated by counsel. But the McCarthy case was where one constructing a part of the railway, under contract, had failed to keep up fences, in consequence of which, stock had escaped and damaged the property of plaintiff. There was there no question of legislative consent but the decision was based expressly upon the duty of the railroad and the agency of the contractor. The Whipple case was an injury through operation by contractors who were constructing the road. Therein, the court held that neither as servants (under the McCarthy case) nor as lessees (under the Dunbar case) could the liability be escaped by the railroad. Thus it is clear that when the Supreme Court cited these three cases it plainly indicated no intention to base its approval upon the principle of the Dunbar case alone but, also, had in mind the announcements in the McCarthy and Whipple cases. The Vermont case was one of failure to properly fence a right of way operated by a lessee under a long time lease and was placed on the lack of power to escape liability by such lease. The Massachusetts case is on all fours with the case before us. There the legislature had authorized a specific switch connection between two roads and a passenger on the older road had been injured by the operation of the switch by an employee of the other road—the latter road being in control of such operation by contract. The court there said (p. 403):

"As passenger carriers, the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of [fol. 158] which the damage occurred, was a part of the defendants' road, over which they must necessarily carry all their passengers; and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended and managed, before they were justified in carrying passengers over it."

It is therefore clear that the approval in the Barron opinion could not have been based solely upon lack of legislative consent to a lease. The case of Central Trust Co. of N. Y. v. Colorado Midland Ry. Co., 97 Fed. 239 (this court), affirming 89 Fed. 560, is in point. In that case the Denver & R. G. R. Company leased running rights over a portion of its tracks to the Midland. A passenger train of the Denver was wrecked by a collision with a freight train of the Midland on that track. The fault was entirely that of the Midland. The Denver sought recovery for amounts paid out to its passengers and for express matter as well as for damage to its equipment. The opinion below is by Judge (later Justice) Brewer, who said (89 Fed. 563):

"Without going further into detail, or enlarging upon minor matters, these thoughts have led my mind to the conclusion that the trainmen of the Midland Company running the train which caused this collision were still the servants and employes of the Midland Company, for whose misconduct and negligence that company is liable; and, although the Denver Company, as a carrier of passengers, will be, and rightfully is, primarily responsible to those passengers, and also to those who placed express matter on its train, yet, as between the two companies, the obligations of the contract justify and require that the Midland

Company shall respond to the Denver Company for whatever pecuniary loss it has sustained by that collision."

On appeal this court said (97 Fed. 242):

"As the Denver Company then owned, possessed, and operated with its own trains the railroad between Newcastle and Rifle Creek, on which this collision occurred, it was liable to its own passengers, and to the owners of property carried by it on its passenger train, for injuries and losses from the collision, explosion, and fire, though caused [fol. 159] wholly, as aforesaid, by the negligence of the receiver's servants while running his freight train upon that section of railroad with the permission of the Denver Company. Railroad Co. v. Barron, 5 Wall. 91, 104. See, also, Heron v. Railway Co., 68 Minn. 542, 71 N. W. 706. The damages sustained by the Denver Company were, therefore, not only the loss of its own property destroyed or injured, but included also the amounts it had to pay for the immediate care of its injured passengers, and of the remains of such as were killed, and the amounts it was required to pay its passengers, and owners of property on its passenger train, in satisfaction for their injuries and losses from the collision."

Also, see Railroad Co. v. Brown, 17 Wall. 445, 451; Kansas City S. Ry. Co. v. Nectaux, 26 Fed. (2d) 317, 319 (C. C. A. 5); Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 745 (C. C. A. 9); N. Y. N. H. & H. R. Co. v. Baker, 98 Fed. 694, 697 (C. C. A. 2).

Appellant relies upon a statement in Ill. Cent. R. Co. v. Sheegog, 215 U. S. 308, 317, as follows:

"Now whether we agree with it or not the doctrine is familiar that in the absence of statute a railroad company cannot get rid of the liabilities attached to the exercise of its franchise, by making a lease,"

as throwing doubt upon the Barron case. But the court did not cite or mention the Barron case and we cannot see such effect in the quoted language (Chic. Rys. Co. v. Kramer, 234 Fed. 245, 249 (C. C. A. 7)).

Reliance is placed, also, on Arrowsmith v. N. & D. R. Co., 57 Fed. 165, where the opinion was by Judge (later Justice) Lurton. But the Barron case is expressly distin-

guished and held inapplicable in that case because the Barron case "was one of joint use by two companies, the permissive use being without express authority of law" (p. 176). This quotation is urged in support of the view that the Barron case rested entirely upon the lack of legislative power to lease. That was not, as shown above, the sole basis although one of the bases of the Barron decision. However, that was the ground in the Barron case which was a distinguishing mark to the issue in the Arrowsmith case.

Necessarily, our conclusion is that appellant is liable to appellee for the negligence, if any, of the Evansville company.

[fol. 160] II and III

The second and third matters argued are insufficiency of the evidence to justify submission, respectively, as to the negligence of appellant and as to the negligence of the Evansville Company. These two propositions may be handled together. This was a res ipsa loquitur case involving the highest degree of care. In many jurisdictions it seems that no directed verdict can be made in such a case and that rule has been weakened only slightly in this Circuit. In the case of Dierks Lumber and Coal Co. v. Brown, 19 Fed. (2d) 732, this court said that the presumption arising from the doctrine of res ipsa loquitur would take the case to the jury "unless the entire evidence is such that the presumption cannot stand against it" and the case was reversed there on the ground that the circumstances of that case clearly rebutted the presumption. The controlling issue in that case was whether the defendant had known of a defect in its electric wiring system long enough to remedy the same and the evidence of the plaintiff showed clearly that the defect had not existed as much as an hour and that it was such character of defect as not to manifest itself before the accident. In short, it is not enough that the evidence of the defendant would, if true, be sufficient to rebut the presumption, because it is for the jury to pass upon the credibility of the witnesses and the truth of the testimony, but the circumstances must be such that no jury would be justified in rejecting such evidence and no court in sustaining a verdict so doing.

As to the Evansville company, the evidence here might or might not be negligence. The negligence consisted in opening the switch and leaving it open. There were three employees of that road (the conductor and two brakemen of the freight train) who had to do with the switch, the conductor being in charge. The circumstances are that a while after the switch was opened, the conductor and the brakeman (who had opened the switch) each looked at the light and it evidenced that the switch had been closed, while the second brakeman, who was with them near the switch, made no satisfactory explanation as to why he did not close the switch. It was a fair question whether any of these three men exercised the highest degree of care in protecting the switch.

The direct negligence of the appellant was in the maintenance of a safe appliance at the switch so that the switch [fol. 161] light would turn to indicate the condition at that point. It was a vital matter that the switch light should indicate this condition and the evidence showed that the appliance had been long in use and could very easily have been made safer and, that if it had been so constructed, the accident would not have occurred. All of the witnesses, except one, who testified to either negligence, were interested in the sense of being employees of one of the railroads) and the exception was of a man who had been employed at that time and was one of the brakemen at the switch. Under these circumstances, the issues were properly submitted to the jury and the judgment should be and is affirmed.

---

[fol. 162] In United States Circuit Court of Appeals, Eighth Circuit

No. 8717

Southern Railway Company, a Corporation, Appellant,

vs.

Jack W. Hussey

Appeal from the District Court of the United States for the Eastern District of Missouri

Judgment—June 26, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Jack W. Hussey have and recover against the Southern Railway Company, a Corporation, the sum of Twenty Dollars for his costs herein and have execution therefor.

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[fol. 163] Clerk's certificate to foregoing transcript omitted in printing.

---

[fol. 164] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

Endorsed on cover: File No. 35,264. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 342. Southern Railway Company, petitioner, vs. Jack W. Hussey. Petition for a writ of certiorari and exhibit thereto. Filed August 9, 1930. File No. 35,264.

FILE COPY

FILED
AUG 9 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

In the Matter of the Petition of the SOUTHERN RAILWAY COMPANY, a Corporation,

vs.

JACK W. HUSSEY.

No. 342

## PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

In the Matter of the Petition of the SOUTHERN RAILWAY COMPANY, a Corporation,

vs.

JACK W. HUSSEY.

No.....

## PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In re Southern Railway Company, a corporation, applying for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Southern Railway Company respectfully shows to this Honorable Court:

## SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

1. That your petitioner is aggrieved by the final judgment and decision of the Circuit Court of Appeals for the Eighth Circuit, entered in that court on the 26th day of June, 1930, in the case entitled Southern Railway Company, appellant, v. Jack W. Hussey, appellee, No. 8717.

2. The important question before that court, decided adversely to the contention of petitioner, was this:

> Is the Southern Railway Company, petitioner, liable to one of its passengers for injuries received in a collision occurring in Indiana, between one of your petitioner's trains and a train of the Evansville, Indianapolis & Terre Haute Railroad Company, without fault on petitioner's part, caused (as alleged) by the negligence of the employes of the Evansville Company in failing to close a switch which
>
> (a) formed a connection between the track of the Southern Company and the track of the Evansville Company;
>
> (b) was installed, owned, controlled and operated exclusively by and for the benefit of the Evansville Company;
>
> (c) was so constructed, maintained and operated under compulsion of a statute of Indiana which made it mandatory upon petitioner to permit its construction and operation; and
>
> (d) was so constructed and operated under a contract expressly authorized by the statutes of the State of Indiana.

3. The facts giving rise to the foregoing question are these:

The Southern Railway Company and the Southern Railway Company of Indiana owned and operated a line of railroad from Louisville, Kentucky, through Indiana to St. Louis, Missouri. The Evansville, Indianapolis & Terre Haute Railroad Company, an Indiana corporation, owns lines of railroad in Indiana. Among the lines owned by the latter company is a coal road extending southwardly from Mine Junction, which is on petitioner's road, to a coal mine of the Francisco Mining Company. The main line of the Evansville Company intersects the line of the Southern Company at Oakland City, which is seven miles east of Mine Junction. In 1922 the Evansville Company, owning the coal road above referred to, desired a connection with the Southern Company's track at Mine Junction and running rights over the Southern Railroad to Oakland City. The sixth subdivision of section 12,931, Vol. 3, Burns' Annot. Indiana Statutes 1926, gave to railroads of that state the right:

> "To cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its construction";

and by the same subdivision of the statute referred to it was further provided that:

"every company whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

The Evansville Company having the right to the connection desired, and the Southern Railway Company being under compulsion to grant such connection, the two companies on January 11, 1922, entered into a contract (Tr., p. 115), in which it was recited that the Southern Company had, for the accommodation of the Evansville Company, constructed a connection between the two tracks, the cost of which the Evansville Company agreed to pay the Southern Company, and by which the Evansville Company undertook to maintain this connection at its own cost and expense; and by which the operation of the Evansville Company's trains between Mine Junction and Oakland City was provided for.

The switch connection here involved was of the ordinary type. The Southern's track at that point runs east and west. The lever by which the switch was opened and closed was on the south side of the Southern Company's track. On the north side of the track was a signal device. The lever and signal device were so connected by throw rods that a green light would be automatically displayed to approaching Southern Company trains if the switch was closed, and a red light would be displayed to approaching Southern trains if the switch was open. The

green light meant go ahead; the red light meant stop. This switch and the light connection were standard equipment (Tr., p. 105). It had been installed for five years and had never been out of order (Tr., pp. 104-110). It had been inspected on the day preceding the accident and had been found in perfect condition (Tr., p. 110).

The collision between the Southern train, on which Hussey was a passenger, and the train of the Evansville Company occurred at about 1:30 o'clock in the morning. Earlier that night the Evansville crew involved in the accident had brought some empty coal cars from Oakland City, had passed over this switch and delivered the cars at the coal mine; had returned, passing over the switch, to Oakland City with loaded cars of coal, and had then made a second trip to the coal mine with empty cars. Having assembled another train of coal cars at the mine, they proceeded to the junction point and stopped two or three car lengths south of the switch. They had to wait about thirty minutes for a Southern freight train which was westbound. After this freight train passed the conductor of the Evansville train crew announced that they would proceed to Oakland City. Whereupon Carson (one of his two switchmen) went to the switch, operated the lever so as to open the switch, and returned to a telephone booth, where the conductor and the other switchman were standing, about twenty or thirty feet away. The conductor then learning that the Southern's westbound passenger train was on time, directed Carson to

go to the engineer and ask the engineer if they had time to make Oakland City ahead of the Southern train. Carson did as he was directed and was informed by the engineer that they did not have enough time to make Oakland City. Carson then started to return to the switch for the purpose of closing it so that the Southern train might pass, but noticing that the green light was displayed, he concluded that the conductor or the switchman, whom he had left near the switch, had closed it. He changed his course and joined the conductor and switchman near the telephone booth, where all three remained awaiting the Southern passenger train. It was as much the duty of the conductor and the other switchman to operate the switches as it was Carson's. But they, too, had observed that the signal showed green, thus indicating that the switch was closed, and so all three of them having observed the proper setting of the light, dismissed the subject and waited until the Southern passenger train came along. Hussey was a passenger on that train. When the Southern passenger train approached the engineer observed the green light displayed and proceeded, as it was his duty to do. In fact, the switch was open and when the train reached the switch it was deflected to the Evansville track and collided with the Evansville train and Hussey was injured. One or more train employes were killed.

An investigation was immediately started, and it was discovered that the failure of the signal to operate prop-

erly was due to a fresh break in a connection between the light staff and the lever which opened and shut the switch. Presumably, this connection had been broken when the Southern freight train passed over this switch, some thirty minutes before the accident.

Hussey brought his suit against the Southern Railway Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. The case was removed to the District Court of the United States for the Eastern District of Missouri, where the case was dismissed as to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and an amended petition was filed against the Southern Railway Company alone. Upon the trial the facts above stated were developed.

The District Court, in its charge to the jury, said:

> "The Court further charges you, as a matter of law, that, under the circumstances in evidence, the Southern Railway Company is responsible for the negligent acts, if any, on the part of the servants of the Evansville, Indianapolis & Terre Haute Railroad Company in the operation of the switch mentioned in evidence."

The jury returned a verdict in Hussey's favor for $20,000.00.

Upon appeal the Circuit Court of Appeals for the Eighth Circuit, after having stated that the cases bearing on the

question of liability here involved "seemed to be, and in some instances were in conflict, or, at least, in confusion," said:

> "It is clear that this accident happened in connection with this switch, either because of defective appliance or because of the operation of that appliance by the railroad given by appellant the right to operate it. The duty of the appellant towards its passengers was to use the highest degree of care to keep that switch safe for the transportation of such passengers over it. Neither as to the maintenance nor as to the use of that switch can the appellant avoid this duty of care. It cannot delegate the duty of maintaining a proper switch appliance so as to lessen its duty in that regard. Equally, it cannot delegate the operation of that appliance so as to lessen its duty.
>
> "The case of Illinois Central Railroad v. Barron, 5 Wall. 90, is directly in point and determines this contention adversely to appellant."

The opinion of the Court of Appeals will be found at page 151 and following of the transcript.

The judgment of that court was entered on June 26, 1930.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

### I.

The decision of the Court of Appeals, that the Southern Railway Company is liable for the negligence of the employes of the Evansville Company in the operation of the switch in question, notwithstanding the fact that the statutes of Indiana compel the Southern Railway Company to permit the Evansville Company to maintain and operate such switch upon its line of railroad, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of N. Y., N. H. & H. Co. v. Baker, 98 Fed. 694, wherein that Court decided that the railroad there involved was not responsible to a passenger for the negligence of a contractor engaged in elevating the railroad company's tracks under employment from a state board, to whom the Legislature, by statute, had delegated the power to make the improvement there under way, and wherein that Court absolved the railroad company from liability upon the consideration that "the state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad, nor even by the state, but by an independent board, in the creation of which the defendant had no voice, over whose selection of employes it had no control, and with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent."

II.

The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of R. R. v. Hoechner, 67 Fed. 456 (opinion by Judge Lurton); with the decision of the same Court in the case of Hukill v. R. R., 72 Fed. 745 (opinion by Judge Taft); with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Hayes v. R. R., 74 Fed. 279; with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Pa. Steel Co. v. N. Y. City Railway Company, 229 Fed. 367; with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Stevenson v. Lake Terminal R. R. Co., decided July 7th, 1930, and not yet reported; and with the decisions of the federal courts in the following cases:

Arrowsmith v. R. R., 57 Fed. 165;
Willard v. R. R., 124 Fed. 796;
Yates v. Ill. Central R. R., 137 Fed. 943;
Clough v. R. R., 155 Fed. 81.

In which cases it was decided that where, *by legislative authority*, one railroad grants to another, by lease or contract, the right to operate over its lines, the owning road, unless itself negligent, is not liable for the negligence of the other road.

III.

The question of the liability of a railroad company for the negligence of another road which, under legislative authority, is admitted upon or across its tracks, is one of great importance; and the Court of Appeals in deciding that a railroad company which, by permission of the state, and, indeed, by its command, admits another road to the use of its properties, is liable for the negligence of the employes of such other road, is in conflict with the weight of authority as reflected in the following:

R. R. v. Sheegog, 215 U. S. 308;
3 Thompson on Railroads, Sec. 3383;
1 Elliott on Railroads, Sec. 540;
Moorshead v. United Rwy. Co., 203 Mo. 121;
Booth v. R. R., 217 Mo. 710;
Cain v. R. R., 27 App. Div. 376 (N. Y.);
Sprague v. Smith, 29 Vt. 421;
Stoddard v. R. R., 181 Mass. 422;
R. R. v. Friedell, 79 Ga. 489;
Wright v. Rwy., L. R. 8 Exch. 137, and cases cited under Reason II.

IV.

The Court of Appeals decided this case adversely to the contention of petitioner chiefly upon authority of the case of Illinois Central v. Barron, 5 Wall. 90. The Barron case arose under the laws of Illinois, whose laws denied to a railroad company the right to lease or grant running rights

over its lines, and whose courts had decided that a road operating over the lines of another without legislative authority did so wrongfully and became the agent of the owning road, and for that reason the owning road became liable for the negligence of the road so operating. The Barron case merely applied the local law. By interpreting the Barron case as establishing the principle that the owning road is liable for the negligence of the road operating on its line under any and all circumstances, regardless of whether or not the Legislature has authorized or directed such operation, the Court of Appeals has given to the Barron case an unjustified significance which will add to the confusion and emphasize the conflict of decisions upon this very important question, unless this Court reviews the question and makes an authoritative pronouncement upon it.

V.

The importance to the railroads of the country of having this question definitely decided will further appear when it is considered that under the Interstate Commerce Act (paragraph 9, Sec. 1) the Interstate Commerce Commission is given authority *to compel* interstate railroads to accord switch connections to any "lateral, branch line of railroad, or private sidetrack"; that by section 4 of paragraph 3 it (the Interstate Commerce Commission) "shall have the power to require the use of any such ter-

minal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier by another carrier or other carriers"; that by the Interstate Commerce Act one carrier is authorized to lease the road of another (paragraph 2, Sec. 5); that by the laws of practically all the states the state commissions are given corresponding powers with respect to roads within their respective states; that under these provisions the railroads are permitted, and in many cases required, to admit other roads upon or across their tracks. The larger systems traverse many different states. Until this Court gives an authoritative decision upon this question these interstate carriers will be subjected to conflicting decisions and differing liabilities in the various states through which they operate, and will be confused as to their liability when confronting the necessity or desirability of admitting other roads to the use of their properties.

## VI.

The question has added importance to the railroads from the fact that Congress has directed the Interstate Commerce Commission to investigate and suggest the consolidation of the railroads of the United States into a small number of large systems. The Interstate Commerce Commission has made such an investigation and has suggested the formation of certain systems, each of which is to be formed by the consolidation of numerous existing railroads. Some of these consolidations are being effected by

the leasing of one or more roads to another. (See lease of Michigan Central to New York Central; lease of Cleveland, Cincinnati, Chicago & St. Louis Railway Company to New York Central.) It is important, therefore, to the railroads to know whether the owning company, when it leases its road to an operating company, remains liable for the negligent acts of the operating company.

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Your petitioner files herewith a certified copy of the entire transcript of the record of all proceedings in this case in the Circuit Court of Appeals for the Eighth Circuit.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings in the case of Southern Railway Company v. Jack W. Hussey, numbered 8717, and that the judgment of the Circuit Court of Appeals for the Eighth Circuit in that cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and this your petitioner will ever pray.

SAMUEL B. McPHEETERS,
CHARLES A. HOUTS,
Counsel for Southern Railway Company.

State of Missouri, }
City of St. Louis. } ss.

Before me, the undersigned notary public within and for the City of St. Louis, and State of Missouri, personally appeared Charles A. Houts, who, being by me first duly sworn, deposes and says that he is one of the counsel for the petitioner herein; that the petitioner, Southern Railway Company, is a citizen of the State of Virginia; that he is familiar with the proceedings described in the foregoing petition for writ of certiorari; that the facts stated in said petition are true and correct to the best of his knowledge and information, and he believes them to be true; that in his opinion the petition is well founded and the case is one in which the prayer of said petition should be granted by this Court.

Charles A. Houts.

Subscribed and sworn to before me this 6th day of August, 1930, in the City of St. Louis.

My commission expires October 23, 1933.

Anna Belle Evans,
Notary Public.

We hereby certify that we have examined and are familiar with the contents of the foregoing petition for certiorari, and in our opinion it is well founded and entitled to the favorable consideration of the Court, and we certify that it is not filed for the purposes of delay.

Samuel B. McPheeters,
Charles A. Houts.

Dated August 6th, 1930.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### I.

### OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed on the 26th day of June, 1930, and is to be found at page 150 et seq. of the transcript of the record.

### II.

The date of the judgment to be reviewed is June 26th, 1930.

The judgment is printed in the record at page 159, and it states the ruling of the United States Circuit Court of Appeals for the Eighth Circuit relied on as basis of this Court's jurisdiction.

The petition for review on writ of certiorari is made upon authority of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

As the jurisdiction does not depend on the nature of the claims advanced, and the rulings made thereon in the Circuit Court of Appeals for the Eighth Circuit, these are not summarized under this heading, but are discussed under the heads of "Statement of Case" and "Argument."

As the right of this Court to review by certiorari the question herein presented is clearly given by the statutes, no cases are cited to support such right.

## III.

## STATEMENT OF CASE.

The principal question presented to the United States Circuit Court of Appeals for the Eighth Circuit and decided adversely to petitioner by it was this:

> Is the Southern Railway Company, petitioner, liable to one of its passengers for injuries received in a collision occurring in Indiana, between one of your petitioner's trains and a train of the Evansville, Indianapolis & Terre Haute Railroad Company, without fault on petitioner's part, caused (as alleged) by the negligence of the employes of the Evansville Company in failing to close a switch which
>
> (a) formed a connection between the track of the Southern Company and the track of the Evansville Company;
>
> (b) was installed, owned, controlled and operated exclusively by, and for the benefit of, the Evansville Company;
>
> (c) was so constructed, maintained and operated under compulsion of a statute of Indiana which made it mandatory upon petitioner to permit its construction and operation; and
>
> (d) was so constructed and operated under a contract expressly authorized by the statutes of the State of Indiana.

The facts giving rise to the foregoing question are these: The Southern Railway Company and the Southern Railway Company of Indiana owned and operated a line of

railroad from Louisville, Kentucky, through Indiana to St. Louis, Missouri. The Evansville, Indianapolis & Terre Haute Railroad Company, an Indiana corporation, owns lines of railroad in Indiana. Among the lines owned by the latter company is a coal road extending southwardly from Mine Junction, which is on petitioner's road, to a coal mine of the Francisco Mining Company. The main line of the Evansville Company intersects the line of the Southern Company at Oakland City, which is seven miles east of Mine Junction. In 1922 the Evansville Company, owning the coal road above referred to, desired a connection with the Southern Company's track at Mine Junction and running rights over the Southern Railroad to Oakland City.

The Sixth Subdivision of Section 12931, Vol. 3, Burns' Annot. Indiana Statutes 1926, gave to railroads of that state the right

> "to cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches and other conveniences, in furtherance of the objects of its construction";

and by the same subdivision of the statute referred to it was further provided that

> "every company whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite

with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

The Evansville Company, having the right to the connection desired, and the Southern Railway Company being under compulsion to grant such connection, the two companies, on January 11, 1922, entered into a contract (Tr., p. 115), in which it was recited that the Southern Company had, for the accommodation of the Evansville Company, constructed a connection between the two tracks, the cost of which the Evansville Company agreed to pay the Southern Company; and by which the Evansville Company undertook to maintain this connection at its own cost and expense; and by which the operation of the Evansville Company's trains between Mine Junction and Oakland was provided for.

The switch connection here involved was of the ordinary type. The Southern's track at that point runs east and west. The lever by which the switch was opened and closed was on the south side of the Southern Company's track. On the north side of the track was a signal device. The lever and signal device were so connected by throw rods that a green light would be automatically displayed to approaching Southern Company trains if the switch was closed, and a red light would be displayed to approaching Southern trains if the switch was open. The green light meant go ahead; the red light meant to stop. This switch and the light connection were standard equipment (Tr.,

p. 105). It had been installed for five years and had never been out of order (Tr., pp. 104-110). It had been inspected on the day preceding the accident and had been found in perfect condition (Tr., p. 110).

The collision between the Southern train on which Hussey was a passenger, and the train of the Evansville Company occurred at about 1:30 o'clock in the morning. Earlier that night the Evansville crew involved in the accident had brought some empty coal cars from Oakland City, had passed over this switch and delivered the cars at the coal mine; had returned, passing over the switch, to Oakland City with loaded cars of coal, and had then made a second trip to the coal mine with empty cars. Having assembled another train of coal cars at the mine they proceeded to the junction point and stopped two or three car lengths south of the switch. They had to wait about thirty minutes for a Southern freight train which was westbound. After this freight train passed the conductor of the Evansville train crew announced that they would proceed to Oakland City. Whereupon Carson (one of his two switchmen), went to the switch, operated the lever so as to open the switch, and returned to a telephone booth, where the conductor and the other switchman were standing, about twenty or thirty feet away. The conductor then learning that the Southern's westbound passenger train was on time, directed Carson to go to the engineer and ask the engineer if they had time to make Oakland City ahead of the Southern train. Carson did as he was directed and

was informed by the engineer that they did not have enough time to make Oakland City Carson then started to return to the switch for the purpose of closing it so that the Southern train might pass, but noticing that the green light was displayed, he concluded that the conductor or the switchman, whom he had left near the switch, had closed it. He changed his course and joined the conductor and switchman near the telephone booth where all three remained awaiting the Southern passenger train. It was as much the duty of the conductor and the other switchman to operate switches as it was Carson's. But they, too, had observed that the signal showed green, thus indicating that the switch was closed, and so all three of them having observed the proper setting of the light, dismissed the subject and waited until the Southern passenger train came along. Hussey was a passenger on that train. When the Southern passenger train approached the engineer observed the green light displayed and proceeded, as it was his duty to do. In fact the switch was open and when the train reached the switch it was deflected to the Evansville track and collided with the Evansville train and Hussey was injured. One or more train employes were killed.

An investigation was immediately started, and it was discovered that the failure of the signal to operate properly was due to a fresh break in a connection between the light staff and the lever which opened and shut the switch. Presumably this connection had been broken when the Southern freight train passed over this switch some thirty minutes before the accident.

Hussey brought his suit against the Southern Railway Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. The case was removed to the District Court of the United States for the Eastern District of Missouri, where the case was dismissed as to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and an amended petition was filed against the Southern Railway Company alone. Upon the trial the facts above stated were developed.

The District Court, in its charge to the jury, said:

> "The Court further charges you, as a matter of law, that, under the circumstances in evidence, the Southern Railway Company is responsible for the negligent acts, if any, on the part of the servants of the Evansville, Indianapolis & Terre Haute Railroad Company in the operation of the switch mentioned in evidence."

The jury returned a verdict in Hussey's favor for $20,000.00.

Upon appeal the Circuit Court of Appeals for the Eighth Circuit, after having stated that the cases bearing on the question of liability here involved "seemed to be, and in some instances were, in conflict, or, at least, in confusion," said:

> "It is clear that the accident happened in connection with this switch—either because of defective appliance or because of the operation of that appliance

by the railroad given by appellant the right to operate it. The duty of the appellant towards its passengers was to use the highest degree of care to keep that switch safe for the transportation of such passengers over it. Neither as to the maintenance nor as to the use of that switch can the appellant avoid this duty of care. It cannot delegate the duty of maintaining a proper switch appliance so as to lessen its duty in that regard. Equally, it cannot delegate the operation of that appliance so as to lessen its duty."

## IV.

## SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals was in error in holding that the Southern Railway Company is responsible for the negligence of the employes of the Evansville, Indianapolis & Terre Haute Railroad Company in the operation of the switch in question, that switch having been installed for and exclusively used by the latter road, under authority of, and by express command, of the statutes of Indiana.

2. The Circuit Court of Appeals erred in holding that there was sufficient evidence of negligence to require the submission of the case to a jury.

## ARGUMENT.

Mr. Justice Holmes, when sitting in the Supreme Court of Massachusetts, said, in his opinion in the case of Stoddard v. R. R., 181 Mass. 422:

> "The liability of a carrier to a passenger is based upon fault, however high the criterion of duty may be placed."

It is fundamental in the law of torts that liability springs from some breach of legal duty. It is a principle that accords with and springs from the most primitive as well as the most enlightened concepts of right and wrong. It has been recognized and applied by all races of whose jurisprudence we have a record. It was developed and consistently applied long before railroads were ever thought of. If that rule is to be departed from with respect to railroads, it can only be justified by compelling considerations of public policy. Does the situation here presented call for a departure from the accepted rule of liability and require that the Southern Railway Company shall be subjected to the payment of a large judgment for personal injuries involved without any fault whatever on its part? The record discloses that it owned a line of railroad through Indiana, with which the Evansville, Indianapolis & Terre Haute Railroad Company sought to secure a connection. The Evansville road was, under the laws of Indiana, entitled to this connection, and under the same laws

the Southern Railway Company was compelled to permit it. This connection involved the installation of a switch. The switch was for the exclusive use of the Evansville road. The Southern Railway had no need for this switch and did not use it. The switch was operated exclusively by the employes of the Evansville road. If Hussey's injuries were the result of negligence, such negligence was that of the employes of the Evansville road. There was no negligence on the part of the employes of the Southern Railway Company. The Court of Appeals has concluded that under the decision of this Court in the case of Illinois Central v. Barron, 5 Wall. 90, it was required to hold that the Southern Railway Company is responsible for the negligence of the Evansville Company under the facts as above outlined.

In so holding, we submit that the Court misconstrued the effect of the decision of this Court in the Barron case; that it failed to consider that the precise question for determination by this Court in that case was whether or not, under the *Illinois law*, the Illinois Central Railroad was liable to one of its passengers for an injury caused by negligence in the operation of a Michigan Central train which had running rights over the Illinois Central tracks. This Court, in sustaining a judgment against the Illinois Central, said:

> "The question is not whether the Michigan Central is responsible, but whether the defendant, by giving to that company the privilege of using the road, have

thereby, in the given case, relieved themselves from responsibility. The question has been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable."

In support of its ruling this Court cited a number of Illinois cases and some from other states.

The Court of Appeals has interpreted the words, "we think rightly," appearing in the opinion of this Court, as giving sanction to a rule of general application in all states, regardless of the local law obtaining, where the question might arise. It failed to consider that this Court was required, in the Barron case, to apply the law of Illinois (R. R. v. Zachry, 232 U. S. 248; R. R. v. Sheegog, 215 U. S. 308), and that the language of this Court should be construed in the light of the precise question there presented. In Illinois it had been decided in early cases that a railroad admitting another upon its tracks was liable for the negligence of the road so admitted. The oldest of these Illinois cases is R. R. v. Dunbar, 20 Ill. 623. The reason for imposing such liability appears from the following extract from the opinion in that case:

"They (railroad companies) undoubtedly derive all their privileges, as well as their existence, from the power that creates them; and we must look to their charter for their power to act. * * * When these bodies accept their charters, they are held to enter into a contract with the state, to discharge all the

duties imposed, and to exercise the rights and privileges conferred on them, in the manner prescribed. * * * It will be observed that the Legislature has been specific in the enumeration of the powers granted, *but in them all, we nowhere find any, either expressly or impliedly, giving them power to lease their road so as to release them from liability.* If such lease be made, and the effect claimed results from them, railroads may avoid all liability to the public. And if such leases should be to irresponsible and reckless persons, the remedies for wrongs inflicted, duties omitted and contracts violated by the lessee, would not be worth pursuing. That the Legislature intended to confer such power on these companies we do not believe."

This quotation followed a statement by the Court that the question was a new one and that there were no authorities to guide it. It is to be observed that the decision in the Illinois case just referred to was based upon the opinion of the Court that a railroad company, under Illinois law, had no power to admit another company into the exercise of the privileges conferred by its charter by the state. This was followed by the case of R. R. v. McCarthy, 20 Ill. 385, where the same court adhered to the same rule of liability and there held that the person guilty of negligence becomes, in law, an agent of the railroad company. The same conclusion was again expressed in R. R. v. Whipple, 22 Ill. 105. This Court, in deciding the Barron case, which arose in Illinois, was compelled, by its rules

of decision, to apply the Illinois law, and the language of its opinion should be restricted to the facts and questions of law presented for decision. That this Court did not consider that in the Barron case it was laying down a rule of liability for universal application, is shown by its language in the subsequent case of R. R. v. Sheegog (opinion by Mr. Justice Holmes), where it was said:

> "Now, whether we agree with it or not, the doctrine is familiar that, *in the absence of statute*, a railroad cannot get rid of the liability attached to the exercise of its franchise by making a lease."

It is to be observed that the general statement of liability in the Barron case depended upon by the Court of Appeals is qualified in the statement in the Sheegog case and by it limited to those cases where no statute is made to apply. That the Sheegog case states the true rule of liability is, we submit, shown by the great weight of authority.

In 3 Thompson on Railroads, Sec. 3383, it is said:

> "The running powers having been granted to the company which has been guilty of the negligence, by or in pursuance of law, the law contents itself with holding the company owning the road and still operating it for itself answerable for its own negligence, and treats the negligence of the other company having such running powers, not as that of the agent of the company owning the road, but as that of a stranger,

and the injured passenger must seek his redress against the company which has really done the wrong."

In 1 Elliott on Railroads, Sec. 540, it is said:

"The lessor and lessee are usually jointly liable for negligence in the management of the road where the lease under which it is operated is unauthorized. There is a clear distinction between cases where the lease is authorized and where it is unauthorized. If the lease is unauthorized there is a joint wrong, for both parties assume to do what the law forbids. The one attempts to escape obligations the law imposes upon it by making a contract which it has no power to make; the other attempts to assume powers it cannot rightfully possess. The lease being void, the lessor has not transferred any duty, and the lessee, in assuming rights and powers to which it is not entitled, is really an intruder and usurper."

In the case of Stoddard v. R. R., 181 Mass. 422, the Court had before it a case in which a postal employe (having the status of a passenger) was injured while on a train of the N. Y., N. H. & H. Railroad. His injuries resulted from a collision with a New York Central train. The New York Central, presumably, had running rights over the New Haven tracks and its negligence caused the collision. The opinion was written by Mr. Justice Holmes, who was then a member of the Supreme Court of Massachusetts.

The Barron case was noted in the opinion. In that opinion Justice Holmes said:

> "But, even if it were shown, as it is not, that the defendant had done an act which in a remote sense made the accident possible, *such as making some contract of letting or hiring with the New York Central road,* to our mind it confuses all principles of liability based upon fault when such an act is relied upon as a sufficient ground of responsibility."

A most painstaking review of the authorities bearing upon this question is to be found in the opinion of Judge Goode in the case of Moorshead v. United Railways Co., 119 Mo. App. 541. Judge Goode was then sitting on the St. Louis Court of Appeals. He was later a Judge of the Missouri Supreme Court, and still later was dean of the Washington University Law School. In that case it was sought to hold the United Railways Company of St. Louis liable for the negligence of the St. Louis Transit Company. The United Railways Company was the owner of the street car lines in St. Louis. It entered into a contract under which the Transit Company operated the properties. This contract had been authorized by the City of St. Louis. Judge Goode reviewed all of the authorities and reached the conclusion that the rule of public policy, which, under other circumstances, would have made the United Railways Company liable for the negligence of the Transit Company, was changed by the permission which the City of St. Louis had given for the making of the contract be-

tween the two companies. That case was taken to the Supreme Court of Missouri where the opinion of Judge Goode was adopted as the opinion of the Supreme Court. It is reported in 203 Mo. 121.

Following the decision of the Moorshead case the Supreme Court of Missouri had before it the case of Booth v. St. Louis, I. Mt. & Southern, 217 Mo. 710. The plaintiff was a brakeman for the Missouri Pacific Railroad Company and was injured while the Missouri Pacific train on which he was employed was passing over a switch track belonging to the St. Louis, Iron Mountain & Southern. It was not disclosed by the evidence in the case whether the Missouri Pacific so operated its train over the Iron Mountain tracks by a lease or contract of some kind. In the Booth case the Supreme Court also reviews the authorities. Its conclusion, so far as it relates to the question of liability involved in this case, is in the following language:

> "When a railroad company is sued for an injury alleged to have been inflicted through the negligence of another company operating a train on its road, the burden of proof may be on the company that owns the road to show its lawful right to allow the other company to use its track, as in the Moorshead case above referred to, but when in such case the plaintiff does not show by what authority the other company is using the road and will not allow the defendant to show it, we have no right to assume that the use permitted was in violation of law or under conditions that rendered the owner of the track liable for the torts of the user."

This comment was provoked by the fact that the lower court had excluded evidence by which it was sought to show that the Missouri Pacific had a legal right to run over the Iron Mountain tracks, just as in this case the contract under which the E. I. & T. H. maintained the switch connection with the Southern tracks was excluded.

Further on in the opinion the Court said:

> "Under the facts of this case we hold that if the plaintiff was injured through the negligence of the Missouri Pacific Company the Iron Mountain Company is not liable, although the Missouri Pacific was at the time using the Iron Mountain track. If the Iron Mountain Company is held liable in this case it must be because of its own negligence."

The Missouri decisions are especially important, not because they state the law in Missouri, but because in the opinion by Judge Goode in the Moorshead case and in the unanimous opinion of the Supreme Court in the same case, and in the opinion in the Booth case they have reviewed all of the important cases upon the subject and have attempted to state the general rule supported by the weight of authority.

Coming now to the federal cases, the most complete review of the authorities is to be found in the case of Arrowsmith v. Railroad, 57 Fed. 165. The opinion in that case was written by Judge Lurton, then Circuit Judge, afterwards a Justice of the Supreme Court of the United

States. The case was one involving liability for the negligent killing of a mail clerk, who, it was decided, occupied the relation of passenger to the railroad. The suit was against the owner of the road as lessor and the operating company as lessee.

Judge Lurton concluded that under the authorities the lessor was not liable for the negligence of the lessee if the lease was authorized by law. In Railroad v. Hoechner, 67 Fed. 456, Judge Lurton wrote the opinion for the Circuit Court of Appeals for the Sixth Circuit, and his opinion was concurred in by Judge Taft, late Chief Justice of the United States Supreme Court, and by Judge Severens. The ruling in the Arrowsmith case previously decided by Judge Lurton was affirmed. Again in the case of Hukill v. Railroad, 72 Fed. 745, in an opinion by Judge Taft, concurred in by Judge Lurton, the ruling in the Arrowsmith case was affirmed. In Hayes v. Railroad, 74 Fed. 279, the Circuit Court of Appeals of the Seventh Circuit held that when a lease was made by legislative authority the lessor was not liable for the negligent operation of the lessee, and in so holding it referred to and affirmed the conclusions of Judge Lurton in the Arrowsmith case. In Willard v. Railroad, 124 Fed. 796, the Arrowsmith case was approved, and the same conclusion reached.

The Arrowsmith case was again cited with approval in the case of Yeates v. Illinois Central, 137 Fed. 943, where in an opinion by Judge Kohlsatt it was held that a plain-

tiff injured by collision of an Illinois Central engine with an engine of the Michigan Central, the latter having joint use of tracks with the Illinois Central, who owned the road, could only recover against the road guilty of the negligence causing his injury; and that the Illinois Central, owner of the road, was not liable for the negligence of the Michigan Central, who, under a contract, had the joint use of the Illinois Central tracks. In so deciding, Judge Kohlsatt said:

> "While the decision of the Illinois Court seems to hold that both the lessor and lessee companies can be held for the negligence of the lessee company, such has not been the holding of the federal courts in cases similar to that before the Court."

In the case of Clough v. Railroad, 155 Fed. 81, the plaintiff was an employe of a circus company which, under a contract with the railroad company, was having two of its circus trains moved over the railroad company's tracks. The railroad company furnished the engines and trainmen to handle these two trains. The trains collided and the plaintiff was thereby i ared. It was held that the railroad company was not liable.

In Pennsylvania Steel Co. v. New York City Ry. Co., 229 Fed. 367, the Circuit Court of Appeals for the Second Circuit had before it the problem of deciding whether the Metropolitan Street Railway Company of New York was liable for personal injury judgments obtained against the

New York City Railways Company. The opinion states the facts and its conclusions as follows:

"February 14, 1902, the Metropolitan Company leased its property and franchises for the term of 999 years to the New York City Railways Company. It was authorized to do this by the Railroad Law of the State of New York, then in force (Chap. 433, Laws 1893, now Sec. 148 of the Railroad Law). The tort creditors contend that, notwithstanding the lease, the lessor remains liable for any negligence in operation by the lessee, because there is no express exemption of the statute. The Court of Appeals of the State of New York has construed this law as relieving the lessor corporation of any such liability (Miller v. N. Y. L. & W. Ry. Co., 125 N. Y. 118). Similar statutes in some other jurisdictions have been differently construed, the courts holding that to relieve the lessor there must be an express exemption in the statute. *There is no authority in the Supreme Court controlling us.*

"Two cases are relied upon by the appellants. In Railroad Co. v. Brown, 17 Wall. 445, the plaintiff was a passenger traveling on a ticket of the lessor railroad company. The act complained of was an assault in the District of Columbia, where the road was being operated by equitable Receivers of the company; the balance of the road in Virginia being operated by the individual lessees. Mr. Justice Davis held: *First.* That a railroad could not escape from its charter duties by voluntary surrender of its road to lessees. He was considering whether there was any difference between an operation under a lease from

the company and under Receivers appointed by the Court. A lease without the consent of the state would be invalid (Thomas v. Railroad, 101 U. S. 71; Abbott v. Railroad, 80 N. Y. 27). At all events there was no reference to any statute authorizing the lease in question, and, of course, no reference to any judicial decision construing such a statute. *Second.* As the lessor company allowed tickets to be issued in its name over the whole line, on one of which the plaintiff was traveling at the time of the acts complained of, it was liable in contract to her. There is no such feature in the case under consideration. The other case, C. B. & Q. R. R. Co. v. Willard, 220 U. S. 413, arose out of an accident in the State of Illinois, whose statute had been construed by the Supreme Court of that state as not exempting the lessor. There being no case controlling us, we are content, even if it is not binding on us, to adopt the construction of the New York statute given it by the Court of Appeals of that state. See also Cain v. Railroad Co., 27 App. Div. 376, 50 N. Y. Supp. 1."

In the case of Cain v. Railroad, the case referred to by the Court of Appeals for the Second Circuit in the case just quoted from, the plaintiff was injured by a coal train of the D. L. & W. Railroad, which was running over the tracks of the defendant in that suit, under a contract between the two railroad companies. The New York Court of Appeals, in its opinion, said:

"The defendant's contention is that it did not actually or constructively do the acts of which the

plaintiff complains. The plaintiff's contention is that the defendant, by accepting the benefits of its corporate franchise and privileges, assumed the obligation of so using them as to protect the public, and thus the plaintiff, from injuries from the negligent use.

"By Chapter 218, Laws of 1839, Sec. 1, it was provided that: 'It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of the irrespective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the use of the road of any railroad corporation by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract.'

"This provision was incorporated in The Railroad Law (Chap. 565, Laws of 1890, Sec. 78, as amended by Chap. 433, Laws of 1893) as follows: 'Any railroad corporation, or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract.'

"Thus, the contract between the two corporations was a lawful one. The defendant did not violate its corporate franchises and privileges in making the contract with the Lackawanna Company, and in observing its obligations on its part—that is, permitting the latter company to run coal trains on its road. As the defendant did no unlawful act, or no lawful act in

a negligent manner, causing damage to plaintiff, it is not liable to her."

In Sprague v. Smith, 29 Vt. 421, Judge Redfield, then sitting on that court, said:

> "But in those cases, where other companies *have the right by law* to run their carriages upon the track of the defendant's road, by paying toll, as is common in England and not uncommon in this country, in point of right, although not done practically to any great extent, it has never been held that one company is liable to passengers carried by them for injuries happening through the fault of other companies, while rightfully upon the same track, and without any fault of the party of the first part. This principle, it seems to us, must control the present case. The defendant's contract only bound them for the skill and diligence of their own operations and those under their own control."

The Supreme Court of Georgia, in the case of Railroad v. Fridell, 79 Ga. 489, expresses the true rule and the underlying reason in the following quotation:

> "Where there is a mutual agreement for the joint use of terminal tracks between the company owning them and another company also having a chartered right to enter the same city, they are entitled to make use of common tracks at the terminal point, and in so doing the licensee exercises its own franchises and not those of the licensor, and the latter is not liable to its

employes for injuries caused by the negligent use of a common track by the employes of the licensee company."

An examination of the English cases will show that the earlier ones were in accord with the Illinois cases hereinabove referred to, and referred to in the Barron case, and for much the same reason. But, after Parliament had sanctioned the leasing and granting of running rights by one road to another, the rule of liability changed, and the rule now in England with respect to liability is in accord with the rule for which we are here contending. This is illustrated by Wright v. Midland Rwy., L. R. 8 Exch. 137. In that case the owning road was sued by one of its passengers for injury received in a collision with a train of another railroad having running rights over the tracks of the owning road. The collision was caused by a failure of the road having such running rights to obey signals. The Exchequer held that the owning road was not liable for the injury thus occasioned its own passenger.

It will be observed that the foregoing cases deal with the liability of carriers who, under legislative authority, *permit* the use of their tracks by other roads. But here we have a situation where the Southern Railway Company was not only permitted to allow the switch connection in question, but under the Indiana Statutes was *compelled* to so allow it. This compulsion, we submit, should be conclusive of the question here presented, even if the views expressed

in the cases above cited should be held not applicable. It would be shocking to all reason and sense of justice to say that the Southern Railway Company is liable for the negligence of the Evansville, Indianapolis & Terre Haute Railroad Company, whose presence upon its property was compelled by the law of the state under which it operated.

A similar situation was before the Circuit Court of Appeals for the Second Circuit in the case of R. R. v. Baker, 98 Fed. 694. A passenger of the railroad was injured by a derrick used in raising the grade of a railroad bridge and constructing certain approaches in the City of New York. The elevatior of the bridge and the construction of the approaches had been commanded by a statute of that state. Under this statute the work was being done under the supervision and under a contract with the Board of Improvement of Park Avenue Above One Hundred and Sixth Street, in the City of New York, which board was created by the Act of the Legislature referred to. The derrick whose negligent operation caused the injury was being used by a contractor on this work. Upon a review of the cases bearing upon the question of liability there presented, including the Barron case, the Court of Appeals decided that the railroad was not liable for the negligence of the contractor, and in so deciding it said:

> "It will be observed that through all these cases there runs the idea of choice—the power to act or refrain from acting. The company need not have taken a lease; it could have built and operated its own road.

It need not have allowed an independent road to run cars on its track; it could have kept them off. It need not have carried its passengers in cars of another company; it could have provided its own, etc.

"The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad, nor even by the city, but by an independent board, in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere, and whose operations it was powerless to prevent."

And the reasoning of the Court of Appeals in the case referred to is directly in point on the case here presented. By the Sixth Subdivision of Section 12931, Vol. 3, of Burns' Anno. Indiana Statutes 1926 a railroad company was given the right to "cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches and other conveniences, in furtherance of the objects of its connections; **and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections, connections and grant the facilities aforesaid.**" Here, as we have repeatedly said in this argument, was an express command from the State of Indiana requiring the Southern Railway Company to permit the Evansville Company to construct, maintain and operate the switch in ques-

tion, and if in that situation it is to be said that the Southern Railway Company is responsible for the negligence of the employes of the Evansville Company, over whom it had no control, a rule of liability will be imposed that is shocking to every sense of justice and which heretofore has not been supported by the decisions of any court having to deal with the subject.

Now, we submit to your Honors that a correct rule of liability cannot be declared in the present case without consideration of the vast change which has taken place in the relationship of the railroads of the country to the Federal Government and to the various states through which they operate. Nor can this case be disposed of without consideration of the laws of Indiana particularly applicable to railroads.

Since the decision of the Illinois cases upon which the Barron case was decided, in the middle of the nineteenth century, the railroads have come more and more under federal and state regulation. Their relationship to each other is now almost completely controlled by state or federal laws. No road can lease or acquire another without permission of the Interstate Commerce Commission. No road can purchase control of the stock of another road without such permission. The power of private control over railroads is gone, and with it have gone also the evils which the Illinois courts feared, and the reasons which impelled them to impose liability on the owning road for negligence

and tortious acts of another road of which the owning road was in no sense guilty.

It would serve no useful purpose to point out all of the powers exercised by the Interstate Commerce Commission over the railroads of the country, but it is of interest in the decision of the question here presented to point out that by Paragraph 9 of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission is given authority to compel interstate railroads to accord switch connections to any "lateral, branch line of railroad, or private sidetrack." Under this the Interstate Commerce Commission could have compelled the Southern Railroad to allow the Evansville, Indianapolis & Terre Haute to make the connection at Mine Junction, which was, in fact, made by agreement between these railroads without any such compulsion on the part of the Commission, but under compulsion of the Indiana statute. And the dominance of the Interstate Commerce Commission is shown by Section 4 of Paragraph 3 of the Interstate Commerce Act, which is as follows:

> "If the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have the power to require the use of any such terminal facilities, *including main-line track or tracks for a reasonable distance outside of such terminal,* of any carrier by another carrier or other

carriers on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

And by Paragraph 2 of Section 5 of the Interstate Commerce Act one carrier is authorized to lease the road, or acquire the stock of another carrier, *subject to the approval of the Commission.*

It will be observed of these provisions of the Interstate Commerce Act that they both permit, and in some cases require, one road to grant the use of its track to another road. And if an owning road can be compelled to grant the use of its track to another road, is it not shocking to one's sense of justice, and contrary to the accepted rules of liability, to declare that the owning road, under such circumstances, should be made liable for the negligence of the road which, without its consent, is admitted to the use of its properties?

Coming now to the laws of Indiana:

By Section 12808, Burns' Anno. Ind. Stat. 1926, the Railroad Commission of Indiana is authorized, and it is made its duty

"to require and supervise the location and construction of sidings and connections between railroads, to

supervise crossing of the tracks and sidetracks of railroads by other railroads now in process of construction or extension, and to prescribe the terms and conditions and manner in which such crossings shall be made," etc.

This is the section to which we have heretofore referred. By subsection "j" of the same section it is provided that

"all railroads subject to this act and operating railroads shall afford reasonable and proper facilities for the interchange of traffic between their respective lines at junction points."

By subsection "k" it is provided that

"every such carrier shall, upon request and upon the payment of reasonable compensation therefor, construct a switch connection from its line to and connecting with any lateral or branch line of railroad, or any private or industrial switch, which shall be constructed adjacent to its line and property in this state, whenever such connection is reasonable, practicable and can be put in with safety, and a reasonable necessity therefor exists. In case of a disagreement thereon, the Commission, upon application, shall determine the compensation for making such connection and maintaining the same."

By section 13106 it is provided that railroad companies organized under the General Railroad Act

"shall have the power to make leases and operating agreements with the electric street or interurban street

railroads, now or hereafter incorporated under the laws of the State of Indiana, and when such leases and operating agreements have been entered into, to make physical connection with each other to be operated by electricity, either jointly or otherwise, and shall have all the rights and privileges accorded to street and electric railways, and shall have the right for the interchange of traffic so as to make one continuous line."

Section 13079 provides that where it is

"necessary or convenient for one railroad company to temporarily 'detour' its trains over the tracks of another road, such other road shall provide suitable engineer or conductor to take the train over the latter road.".

These provisions of the Indiana statutes are pointed out for the purpose of showing the control which the Railroad Commission of Indiana has over railroads in that state, the compulsion to which they are subjected in the way of facilitating traffic over each other's lines and the corresponding right which is granted to one road to operate over another road under the conditions prescribed.

Besides the statutes just referred to, the Legislature of Indiana had passed the statutes which were pleaded in the defendant's answer in this case.

By the sixth subdivision of Sec. 12931, Vol. 3, Burns' Annotated Indiana Statutes, 1926, the E. I. & T. H. was granted the right

"to cross, intersect, join and unite its railroad with any other railroad before constructed, to any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its construction; and every company whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

Also sections 13206, 13207 and 13208 of the Indiana statutes are as follows:

"Sec. 13206. (Contracts between connecting roads.) All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said companies may agree upon.

"Sec. 13207-2. (Contracts ratified.) All contracts heretofore made in good faith between railroad companies organized under the laws of this state, acting by their respective boards of directors, by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, are to be run and operated over the track and road of another railroad company, are hereby ratified and made legal.

"Sec. 13208. (Liability to third persons.)—3. Every railroad company that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains, in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

The Supreme Court of Indiana in R. R. v. Railroad Commission, 171 Ind. 189, which was a case involving an order of the Railroad Commission requiring the building of an interchange track five hundred feet long, said of some of the laws above referred to:

"The very purpose of the statutory requirement and order is to facilitate the movement of commerce, that the two railroad companies may the more efficiently perform the function for which they were chartered."

Now, under the laws of Indiana both these companies had the right to make the contract which was offered in evidence and excluded by the Court. In making such contract these companies did not violate any of the duties imposed by law upon them. When the Legislature of Indiana enacted these statutes it was made obligatory upon all railroads operating in that state to permit just such connections as were made between the Southern Railway

Company and the E. I. & T. H. at Oakland City and Mine Junction. The Southern Railway Company had no power to refuse such a connection. Recognizing the right of the E. I. & T. H. to make its connection with the Southern rails, and in order to sensibly comply with the law, the two companies made a contract under which the switch in question was to be installed and operated. This contract was in strict compliance with the Indiana statutes and permitted by such statutes. The Southern Railway was not attempting to evade any of its public duties. The E. I. & T. H. Railway was chartered by the State of Indiana and was and is a railroad on a par with the Southern. It is not an irresponsible railroad company. The Indiana statute expressly makes it responsible for its own negligent acts in the operation of this switch and in running over the Southern tracks. There is nothing in the facts to evidence any attempt by either company to evade its just responsibilities. If any company was negligent, causing this plaintiff injury, it was the E. I. & T. H. We deny there was any such negligence; but if there was, this plaintiff can sue and recover against the E. I. & T. H., and any judgment he obtains will undoubtedly be paid. But we say that the Southern, by permitting the E. I. & T. H. to operate this switch and over its lines, under a contract authorized by the State of Indiana, is not liable for any negligence of the E. I. & T. H. employes.

By admitting the Evansville, Indianapolis & Terre Haute to make a switch connection with its road it vio-

lated no duty to the State of Indiana; in fact, it was required by the laws of Indiana to do so. It violated no duty to the public, of which plaintiff was one. It violated no duty to plaintiff, because none of its employes were negligent. It did not violate its contract of carriage, because a carrier of passengers only contracts to use that degree of care in transporting them which the law prescribes. It does not *warrant* safe passage. Permitting the Evansville road to make the connection and maintain the switch was not carelessness and, therefore, was no violation of its contract with its passengers. If, then, as is universally held, liability for negligence implies a violation of some duty from which injury results, what is the duty that the Southern Company violated which would impose liability upon it? It violated no duty to anyone and it, therefore, cannot be held liable. The laws of Congress embodied in the Interstate Commerce Act, and the laws of Indiana reflected in the statutes which we have cited, and the laws of all the other states which are similar to those of Congress and those of Indiana, have swept away the reasons underlying the old cases which imputed to the owning road the negligence of other roads using its tracks, and have left the question of liability for negligence to be determined by the universal principles applicable thereto. And the controlling principle is, that one is liable for his own negligent acts, for a violation of some duty he owes, and is not liable for a violation of duties

owed by persons over whom he has no control. In this case the Southern Railroad Company had no supervision whatever over the train crew of the Evansville road which was operating its switch. That control was exercised exclusively by the Evansville Company. The Southern Company did not hire them; it could not discharge them. That power rested exclusively in the Evansville Company. And so we say that no reason can be given for holding the Southern Company liable for what the Evansville employes may have done or left undone.

Upon consideration of the matters set out in the petition for certiorari and in this brief your petitioner asks that the petition for writ of certiorari be granted.

Respectfully submitted,

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Of Counsel.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 342.

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JACK W. HUSSEY.

## SUPPLEMENTAL BRIEF.

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## SUPPLEMENTAL BRIEF.

The brief supporting the petition for certiorari deals with the question of the liability of one road for the negligent acts of a connecting road, which, undoubtedly, is the question of greatest importance to the profession and public generally involved in this case. But there still remains a question not discussed in the supporting brief, but which has an important bearing upon the final outcome of this

case, namely, whether there is any evidence of negligence on the part of the Southern Company or the Evansville Company. As bearing upon this question, petitioner submits the following propositions:

## PROPOSITION I.

There was no negligence on the part of the Southern Railway, because the Southern Railway could not be said to have been negligent in using standard equipment, which had long been in use, which had never before been out of order.

Ozanne v. Ill. Central, 151 Fed. 900, affirmed 157 Fed. 1004;
Adduci v. Rwy., 215 Mass. 336;
Homestead Mine Co. v. Fullerton, 69 Fed. 293,

and the break in the signal device, which was the direct cause of the accident, was due to a latent defect which could not have been discovered by the most careful inspection:

Buckland v. R. R., 181 Mass. 3.

## PROPOSITION II.

There was no evidence of negligence on the part of the employes of the Evansville road.

## RESTATEMENT OF THE FACTS AND ARGUMENT.

Undoubtedly the primary cause of the accident was a fresh break in the mechanism which connected the signal light with the switch lever.

The Southern track ran from east to west. At the point where the Evansville track joined with the Southern track the connection was made by an ordinary switch. The lever which operated this switch was opposite the switch points and was on the south side of the track. The light stand was on the north side of the Southern's track. It consisted in part of a staff twelve or fifteen feet high, surmounted by four signal lights, two of which, at night, showed green, and two of which showed red. (See Exhibit 2, Trans., p. 138.) This light staff was connected by throw rods with the switch lever on the opposite side of the track. It was so constructed that when the switch was closed the green lights were displayed eastwardly and westwardly along the Southern tracks. When the switch was open the red lights showed eastwardly and westwardly along the Southern tracks. Unless disconnected the lights invariably indicated whether the switch was open or closed.

The connection between the switch lever and the light staff was, as stated, by means of throw rods. The lower end of the light staff fitted in a square hole in a short steel crank (Exhibit 3, Trans., p. 138). This crank was held in place by a set screw. A throw rod was attached to the other end of the crank, and the throw rod was in turn

connected with the switch points and the switch lever on the opposite side of the track. This light stand had been installed and in use for about five years before the accident (Trans., p. 121), and it had never before been out of order (Trans., p. 121). During that time fifteen or twenty trains per day had been operated over the switch (Trans., p. 122). It was inspected once a week by the Southern section foreman, his latest inspection having been on the day preceding the night of the accident (Trans., p. 121). His inspection covered the light, the rod that supported it, the throw rod, the throw-rod connections and the crank at the bottom of the light staff (Trans., p. 121). There was then nothing out of order. The Evansville crew in charge of its coal trains had gone in and out of this switch three times on the night of the accident and the switch and lights had operated properly (Trans., p. 78). Twenty-five minutes before the accident a Southern extra freight train passed westwardly over the switch. The passage of this train furnishes the only suggestion of the cause of the break in the connection with the light stand, which was discovered immediately after the accident.

T. E. Veith, supervisor of bridges and buildings for the Southern, was a passenger on the Southern train that was wrecked. Immediately following the wreck he and other employes of the Southern started an investigation to discover the cause of the wreck. He found the switch opened to the Evansville track. The switch lever was in proper position for the open switch (Trans., pp. 107-108). The

lights on the light stand, however, showed green up and down the Southern track, when they should have shown red. He then proceeded to examine the light stand. He found the throw rod properly connected to the crank which operated the lights, but the crank had dropped and was disconnected from the light staff (Trans., pp. 110-111). This was due to a crack in that part of the crank which had been attached to the light staff. This crack permitted the crank to drop off of the light staff. This crack was "a fresh crack"; it was "absolutely bright" (Trans., p. 111).

There is nothing in the evidence to indicate the cause of the break in this crank unless it be attributed to the passage of the Southern extra freight train some few minutes before. It could not be attributed to the wrecked Southern passenger train because, undoubtedly, the break in the crank and the resulting inoperative condition of the light stand had occurred before the passenger train arrived.

Upon the state of facts thus disclosed, we submit that there is nothing to show negligence on the part of the Southern Railway. The light stand and its connection with the switch lever were standard equipment. This is not controverted. This particular light stand had been in operation for five years. It had never been out of order. It would not have been out of order on this occasion but for the break in the crank that connected with the switch lever. This break was a fresh one. It was so recent that it could not have been discovered by an inspector. It oc-

curred after an inspection made on the very day of the accident.

It will be argued that if a different design in the connection of the crank with the light staff had been employed the falling of the crank from the staff could have been prevented. This retrospective criticism of an appliance that fails is familiar. It is always possible after an accident has happened to suggest some means by which it might have been prevented. In this case it is suggested that bolts might have been used instead of set screws to hold the crank on the light staff. It might also be suggested that if the crank had been welded to the staff it would not have come loose. But are not these suggestions beside the point? The set screw had fulfilled its purpose by holding the crank on the staff for five years. It had never failed. It would not have failed in this case but for the break in the crank. The break was something that neither the manufacturer of the signaling apparatus nor the railroad could anticipate. This break resulted from some latent defect in the crank or from some unexplained blow. If the crank had been made of a different material or of thicker metal it might not have broken, but there is no criticism of it on this score. Presumably the material out of which it was made and its thickness had been considered by those who designed it. Nevertheless, it is indisputable that the break in the crank and not the method of its attachment to the staff was the cause of the occurrence.

In the case of Buckland v. Railroad, 181 Mass. 3, an injury to a passenger occurred under circumstances very similar to those here present. In that case the accident happened because of the improper setting of a switch. The switch was operated by a towerman in a tower. The towerman operated the levers so as to set the switch in the desired position. It developed that a pin in the connecting device had broken, so that when the towerman operated his lever the switch did not turn as it should have turned. The evidence showed that proper inspection had been made, which had failed to disclose the broken pin. In deciding that no evidence of negligence was presented the Supreme Court of Massachusetts said:

> "A carrier of passengers, while bound to use the utmost care consistent with the nature and extent of its business, is not responsible for hidden defects which could not have been discovered by the most careful inspection."

It would have been easy in that case to suggest, as has been done in this case, that a larger pin might not have broken, or that some other method of connecting the tower lever with the switch might have prevented the accident. But this would have been mere speculation. To permit such considerations could only result in making a carrier of passengers insurers of their safety. No such obligation rests upon them. Under the law carriers are only required to exercise a degree of care commensurate with the dangers attending their business.

In the case of Ozanne v. R. R., 151 Fed. 900, it appeared that the plaintiff, a lady, had been injured while in the dressing room of a Pullman car. When the train struck a curve she fell, breaking her hip. It was claimed that the railroad was negligent in that it had no fixtures to hold on by hand and no seat such as is common in the men's toilet room of a Pullman. The evidence showed that the car was a standard Pullman car; that that design of car was quite generally in use; that no similar accident had happened before. In holding that there was no evidence of negligence on the part of the railroad company, the Court quoted from Moore on Carriers as follows:

> "Carriers of passengers, especially in vehicles and conveyances propelled by steam or electricity, where the consequences of an accident from defective machinery are almost certainly fatal to human life, are bound to use every precaution which human skill, care and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection. It is their duty to adopt and use such means of safety as science has made known and demonstrated to be useful and effective, not unknown and untested practice, but those which to some extent at least have been used and deemed indispensable to safety. While it has been held that carriers of passengers are bound to keep pace with science and art and modern improvements in supplying safe vehicles, and must adopt the most improved modes of construction and machinery and appliances of safety in known use, it is now more generally held by the courts that it is sufficient that they

> have all approved appliances that are up to the standard of those in general use, and which are necessary for the safety of passengers. But the rule does not impose upon carriers the duty of so providing for the safety of passengers that they shall encounter no possible danger and meet with no casualty in the use of the appliances provided by the carrier, **and negligence cannot be attributed for the use of an appliance which has been employed, under varying conditions, upon countless occasions, and uniformly answered its purpose without injury to anyone.** And they are not bound to adopt and use a new and improved method because safer and better than the methods employed by them, if it is not requisite to the reasonable safety and convenience of passengers, and if the expense is unreasonably excessive."

We submit that this quotation fully states the law and that the Southern Railway, in permitting the installation and use on its line of the switch and signaling device here involved, fulfilled its whole duty to its passengers. This particular instrumentality had been installed for five years. It had never been out of order. It was standard equipment. Similar apparatus was in use on other parts of its line. It had been frequently inspected. The Southern had no reason to believe that it was not in all respects safe and suited to the purposes for which it was installed.

Hence, we respectfully say that there was no negligence in this case on the part of the Southern Railway Company.

We next ask the Court to consider whether there was any negligence on the part of the employes of the Evansville road.

There were only three of its employes charged with any duty with respect to the operation of this switch. These three were the conductor, Hughes, and the brakemen, Carson and Stanley. On the night of the accident this crew, together with the engineer and fireman, had gone in and out of this switch three times in handling coal trains between the mine and Oakland City (Trans., p. 78). Just preceding the accident they were returning from the mine to Oakland City at about 1 o'clock in the night. It was dark. They were provided with lanterns to guide them in their work. The engineer on approaching the Southern track stopped about three car lengths from the switch. The conductor, Hughes, and the two brakemen went to the telephone booth, which was about thirty feet from the switch. Hughes called the dispatcher at Oakland City for running orders (Trans., p. 79). The dispatcher told him he could proceed. Thereupon the conductor said to Brakeman Carson, "All right," which meant they would then go on to Oakland City (Trans., p. 94). Carson, the brakeman, then went to the switch and threw it so as to permit his train to go onto the Southern track. Carson then says that the switch points "fitted up all right" (Trans., p. 95). The conductor then thought of the Southern passenger train and upon looking at his watch saw that they did not have very much time to make Oakland City. He then told Carson to ask the engineer of his train if he (the engineer) thought they could make Oakland City ahead of the passenger train. The engineer said they

could not (Trans., pp. 79-80). Carson testified the engineer said, "Well, Harry, we better not try it.". His testimony of what then occurred is as follows:

"I turned around, with nothing on my mind but lining that switch up; first thing I noticed was a green switch light; well, I would have knowed there was something wrong if I hadn't left the conductor out ahead and brakeman beyond, and I just figured one of them had lined it back again, see.

Q. You looked up and saw the light?

A. Yes, sir.

Q. And did the light show——

A. Green lights——

Q. You then thought that some of the others had thrown it to line it for the main line; is that right?

A. Never thought nothing else. If I hadn't left two men there I would have known something was wrong, for the light would have shown lined red for the siding.

Q. Then as soon as you threw the switch to let your train out——

A. It would have went red.

Q. Should have gone red for the main line; is that right?

A. Absolutely.

Q. Then when you went and saw the engineer and he said you wouldn't——

A. Couldn't make it.

Q. Couldn't make it, you say you started then to throw the switch?

A. Turned around, not thinking nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I

turned around and seen the green switch, never thought practically anything about it, just thinking one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was.

Q. You sat there until the train got there?

A. Yes.

Q. Where were you sitting?

A. I was on the east side of the telephone box, I imagine, about thirty feet of the switch" (Trans., pp. 95-96).

On cross-examination he testified:

"Q. And you say that you did not have to go back and again look at the points, when you knew the Southern was coming through, because you thought somebody else had done so?

A. Well, you see, here is what got me—the switch should have showed red.

Q. Yes.

A. But I left the conductor and the flagman there by the telephone box, the conductor was in the telephone box when I left to go in, and the dispatcher changes their line lots of times, you know, and I just figured that the conductor or dispatcher, one, says, 'Well, don't try to make it—just stay here,' and one had stepped over and lined it back to be green, but if there had been nobody up there I would have known something was wrong, because it would have shown red.

Q. In other words, you were misled?

A. By the switch.

Q. By the switch light, weren't you?

A. The switch light is what fooled me, and by leaving them out there I thought one of them throwed it" (Trans., pp. 98-99).

It was the duty of the conductor, as well as the brakeman, to throw the switch (Trans., p. 79).

This testimony clearly explains how Brakeman Carson, who had opened the switch to let his train onto the Southern track, was led to believe that the switch had been closed and was in proper position to let the Southern passenger train pass. He was, of course, ignorant of the fact that the connection between the light stand and the switch levers had broken. It had never been out of order before. He had no reason to doubt the significance of the green lights being displayed up and down the Southern track. He knew that the light and the switch were so connected that (in the absence of their being out of order) when the light showed red the switch was open, and that when it showed green it showed the switch was closed. This was invariable. If the mechanism was in proper order it could not be otherwise. He could depend upon the lights with as much certainty as could the engineer of the Southern passenger train, whose actions were guided solely by such lights. In all of the intricate operations of trains in and out of complicated terminals and over the great railway systems of the country the operatives are required, per necessity, to depend absolutely upon similar signals, which in the nighttime are given by green, red or other colored lights. Carson, the only one of this crew whose actions

can be questioned, knew when he turned from talking with his engineer, three car lengths away, that the conductor and the other brakeman were near the switch. He knew that the conductor and other brakeman had the power and the duty of operating the switch. He knew that the conductor was in communication with the dispatcher at Oakland City, and he had a right to believe that if the conductor (who was his superior) changed his mind about proceeding to Oakland City he could either throw the switch himself or direct the other brakeman to throw it. In this situation, when he saw that the lights were so set as to indicate that the switch had been thrown, he had reasonable grounds, we submit, for believing that it had been thrown by either the conductor or the other brakeman, and that in so concluding he was not guilty of negligence. After having observed the position of this light he rejoined the conductor and other brakeman at the telephone booth, some thirty feet from the switch, and waited for the Southern passenger train to pass. All three of them observed the green light, and to all three of them the position of the light indicated to them to a moral certainty that the switch was properly set for the passage of the Southern train. To hold that in these circumstances any or all of these men were negligent is to require of them a degree of caution entirely beyond the reasonable.

The solution of the question here presented cannot, of course, depend upon any binding decisions of the courts. The facts in each case vary. It must be determined by

reason, experience and good judgment. But it is a practical matter which ought not to be disposed of by applying impracticable standards of conduct. But as an illustration of a sensible appreciation of a practical matter, as distinguished from a hypercritical consideration of it, we refer to the case of Gray v. B. & O., 24 Fed. (2d) 672. The opinion was delivered by the Circuit Court of Appeals for the Seventh Circuit. The Court had under consideration a case in which a switch light had been put out, the switch light broken and the switch thrown by a negro, who was convicted and sent to the penitentiary for a criminal act in so doing. The train was derailed and a passenger hurt. The railroad was sued and in the suit it was charged that the engineer of the train was negligent in not having observed that the switch light was out and that other railroad employes were negligent in not having examined the switch after having seen the negro at the switch with a crowbar and other instruments. The testimony revealed that the engineer, who had operated over this line many times and was familiar with the position of the various lights, did not notice that the particular light was out. The Circuit Court of Appeals very sensibly, as we think, declared that it was expecting too much of an engineer, under the circumstances there disclosed, to remember this particular light and to gauge his position as his train was proceeding and to observe that it was not burning. A more exacting standard could, of course, have been applied in that case. It could have been said that the engineer

should have remembered the light and that in the darkness should have known when he approached it and noticed its absence; just as here it is claimed that Carson, after having seen the green light displayed along the Southern track, should, nevertheless, have taken his lantern and in the darkness should have gone to the switch and examined the points to see that their position corresponded with the position of the signals. This, we say, is imposing a too-exacting standard of conduct upon him. He was acting and thinking as practical railroad men act and think, and as he had a right to think under the circumstances. He was not guilty of negligence, and if he was not guilty of negligence there was no negligence whatever shown in this case.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JACK W. HUSSEY,
Respondent.

No. 342.

## PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

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No. 342.

## PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

Respondent, in his supplemental brief, challenges the power of the District Court to have determined, and presumably of this Court to now determine, that the evidence failed to show negligence on the part of the defendant. He says, in effect, that in a res ipsa loquitur case the trial court cannot direct a verdict, and that in all such cases the issue must be submitted to a jury. In support of this

view the case of Gleason v. U. S., 140 U. S. 143, has been put forward.

That respondent misinterprets the effect of the decision in that case is, we think, clearly demonstrated in the case of Holland v. Director General, 273 Fed. 928, decided by the Circuit Court of Appeals for the Third Circuit. This, too, was a passenger case. The train upon which the plaintiff was riding was derailed, the derailment being caused by a break in the rail, due to a latent defect. The rail had been inspected shortly before the accident. The Court of Appeals truly stated the applicable law, we submit, in the following language:

> "If, on the other hand, the defendant had used that high degree of care for the safety of the plaintiff, Hazel Holland, which it owed her under the law, and the evidence showing such care was undisputed, or if disputed or conflicting, was nevertheless of so conclusive a character that the Court, in the exercise of a sound judicial discretion, would set aside a verdict in opposition to it, it was the duty of the trial judge to direct a verdict, for he stands primarily charged with the full responsibility for the just outcome of the trial (citing cases). In an accident such as this, which raises a presumption of negligence, the case must go to the jury unless the evidence introduced by the defendant conclusively exculpates it from negligence."

The language quoted reflects the rule of law announced by this Court in the case of Slocum v. Insurance Co., 228 U. S. 364, where this Court said:

> "As a preliminary to the consideration of the first question it may be well to repeat what this Court often has said, that when, on the trial of the issues of fact in an action at law before a federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the Court may and should direct a verdict for the other party."

In Dierkes Lbr. Co. v. Brown, 19 Fed. (2d) 732, which was a res ipsa loquitur case, the Circuit Court of Appeals for the Eighth Circuit said:

> "The presumption arising from the circumstances may be sufficient to take the case to the jury unless the entire evidence is such that the presumption cannot stand against it."

In the case of Penn. R. R. v. Buckley, 210 Fed. 268, the plaintiff, a passenger, sued for injuries received in the derailment of the train. The cause of the derailment is thus stated by the Court:

> "Immediate inspection of the switch disclosed a broken lug or crank—an inconspicuous but important part of the mechanism—and disclosed, further, that a

small latent defect existed, such as might occur in the process of casting. This defect was not visible on the surface of the lug, but showed itself on the edges of the broken metal. The morning was very cold and the low temperature may have had something to do with the break. There can be little doubt concerning what took place. The vibration of the heavy engine, the latent defect, and, perhaps, also, the influence of the cold, combined to break the lug and then to jar the points of the switch out of place, thus deflecting the last three cars into the siding."

Upon this state of facts the Court said:

"There being no doubt that the plaintiff was injured while a passenger, and that his injury was due to a defective appliance of transportation, a presumption of the carrier's negligence arose immediately and required explanation. The explanation was offered and, in several respects, was certainly sufficient. It showed that the switch was new, was an approved device, and had come from a skilled maker. It also showed very recent inspection, and, if this inspection were adequate, if it measured up to the standard of care imposed upon the carrier, nothing more could be demanded. The defendant could not be held liable simply because an accident had been caused by a latent defect if it had performed every duty imposed by law."

See, also, Gray v. B. & O. R. R., 24 Fed. (2d) 671, a passenger case, in which the Circuit Court of Appeals for

the Seventh Circuit found that the evidence of the defendant was sufficient to exculpate it from blame.

See, also, Warner v. B. & O., 168 U. S. 339, which was a passenger case, in deciding which this Court said:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

This having been said with respect to a res ipsa loquitur case, a case in which a passenger had been injured, leads to the fair inference that where in such a case reasonable men may not fairly differ upon the question of negligence, a verdict may and should be directed by the trial judge.

In Elliott v. R. R., 150 U. S. 245, this Court said:

> "It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

There is no reason why a res ipsa loquitur case should be exempted from the rules thus laid down by this Court. The happening of the accident in a res ipsa loquitur case is evidence of negligence. It is not conclusive evidence of

negligence. It may be little or great, depending upon the particular circumstances. It requires the defendant to exculpate himself. But when a defendant establishes a state of facts which, in the minds of reasonable men, destroys the inference of negligence, surely it is the Court's privilege and duty to direct a verdict for him. The scintilla rule does not obtain in the federal courts. (See Gunning v. Cooley, 281 U. S. 90.)

The defendant in the instant case moved for a directed verdict at the close of all the evidence in the case. The question of the propriety of denying this motion is one properly to be considered by this Court. (See Slocum v. Insurance Co., 228 U. S. 364.)

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

In the Matter of the Petition of the SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,
vs.
JACK W. HUSSEY,
Respondent.

No. 342.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

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|---|---|
| In the Matter of the Petition of the SOUTHERN RAILWAY COMPANY, a Corporation, Petitioner, | No. 342. |
| JACK W. HUSSEY, Respondent. | |

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the cause of Southern Railway Company, a corporation, appellant, v. Jack W.

Hussey, appellee, which the petitioner herein seeks to have reviewed by this Court on certiorari, has not been as yet published in the federal reports, but is fully set forth in petitioner's printed transcript of the record herein on pages 151 to 159 thereof, inclusive.

## II.

## STATEMENT OF THE CASE.

Respondent Jack W. Hussey, as plaintiff, brought suit against this petitioner, Southern Railway Company, and Cleveland, Cincinnati, Chicago & St. Louis Railways Company, in the Circuit Court of the City of St. Louis, Missouri, on January 19, 1928, to recover damages for personal injuries sustained by him while a passenger on one of petitioner's trains (Tr., pp. 2, 3). Thereafter, said cause was, upon the petition of the said defendants therein, removed to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri (Tr., pp. 7, 8). The suit was subsequently dismissed as to said defendant Cleveland, Cincinnati, Chicago & St. Louis Railways Company (Tr., p. 14), and resulted in a verdict and judgment, in said District Court, in favor of this respondent, Jack W. Hussey, in the sum of $20,000.00 (Tr., pp. 19, 20), from which judgment this petitioner, Southern Railway Company, appealed to the United States Circuit Court of Appeals, for the Eighth Circuit, where, on June 26, 1930, at the May Term, 1930, of said court, said judgment was affirmed in an opinion

of said Court of Appeals written by the Honorable Kimbrough Stone, Circuit Judge, and concurred in by Judge Van Valkenburgh, Circuit Judge, and Judge Otis, District Judge (Tr., pp. 151 to 159, inclusive).

The amended petition of respondent (plaintiff below) on which the cause was tried, after formal allegations, alleges that respondent was a passenger on a train of petitioner, en route from Louisville, Kentucky, to St. Louis, Missouri, and that while respondent was such passenger and had reached a point near Princeton, Indiana, said train came into collision with another train, causing respondent to be thrown in and about the car in which he was riding, all of which occurred as the result of negligence and carelessness on the part of petitioner, its agents and servants, and as a direct result of such negligence and carelessness respondent was seriously and permanently injured as alleged in said amended petition (Tr., pp. 14 and 15).

The answer of petitioner (defendant below) to this amended petition was a general denial, together with allegations to the effect that the collision referred to in respondent's amended petition occurred in Indiana, and that there was then and there in force in said state a statute including Section 12931 of Volume III of Burns' Annotated Statutes of Indiana 1926, the sixth subdivision of which is as follows:

> "Sixth: To cross (intersection) (joint) and unite its railroad with any other railroad before con-

structed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences, in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

And said answer alleged that there was then and there in force in said state statutes known as Sections 13206, 13207 and 13208 of Volume III of Burns' Annotated Statutes of Indiana 1926, as follows:

"Section 13206. (Contracts Between Connecting Railroads). 1. All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said companies may agree upon."

"Section 13207. (Contracts Ratified.) 2. All contracts heretofore made in good faith between railroad (companues) (organused) under the laws of this state, acting by their respective boards of directors, by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, are to be run and operated over the tracks

and road of another railroad company, are hereby ratified and made legal."

"Section 13208. (Liability to Third Persons.) 3. Every railroad that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

And it was alleged in said answer that prior to September 2, 1927, the Evansville, Indianapolis and Terre Haute Railway Company (hereinafter referred to as the Evansville Company) owned a railroad track which connected with petitioner's track at or about the place where said collision occurred; that prior to the construction of said track petitioner and said Evansville Company entered into a contract which was in force and effect at the time of said collision, by the terms of which it was provided that the connection between the latter's track and that of petitioner's should be made and that all switches, switching devices, signal devices and signal lights necessary and proper for the safe operation of said switches should be installed and maintained by said Evansville Company; that pursuant to said contract said connection was made and said switches and signal lights were installed and have been maintained at said point by said Evansville Company, and were so maintained at and prior

to the time of said collision; that on said September 2, 1927, as petitioner's train upon which respondent was riding approached said connection, the signal lights at said switch were so set as to show to petitioner's engineer in charge of the locomotive hauling said train that said switch was so set as to permit and require him to proceed without stopping at said switch, and that relying upon said signal said train proceeded at its usual and customary rate of speed; but that, in fact, said switch was so set as to turn petitioner's engine and train onto the track of said Evansville Company, upon which cars belonging to the latter company were standing, and with which petitioner's train was caused to collide; that through some defect or insufficiency in said signal light and the mechanism which controlled it, said light failed to disclose to defendant's said engineer the position of said switch, but on the contrary indicated that said switch was so set that petitioner's train would stay upon its track and would not be deflected to the track of the Evansville Company; and that the condition of said switch and light was not known to petitioner, its agents and employes in charge of its track and of its said locomotive, and could not have been discovered by them by the exercise of the degree of care required of them, and that said collision was not due to any negligence on the part of petitioner, its agents, servants and employes (Tr., pp. 16, 17).

Respondent's reply was a general denial (Tr., p. 19).

At the trial, respondent, as plaintiff below, adduced testimony showing that on the night of September 2, 1927, plaintiff was a passenger upon a west-bound train of petitioner enroute from Louisville, Kentucky, to St. Louis, Missouri; that about 1:30 on the following morning, when petitioner's train was a short distance from Princeton, Indiana, it came into violent collision with another train, by reason whereof plaintiff was hurled from the berth in which he was sleeping to the floor of the car, sustaining the injuries for which he sues (Tr., pp. 48 and 49). With this testimony, and that pertaining to the character, extent and permanency of plaintiff's injuries (Tr., pp. 30 to 47, inclusive, pp. 49 to 59, inclusive) respondent rested his case.

The testimony in behalf of defendant, aside from the testimony of medical experts which is not here pertinent (Tr., pp. 60 to 72, inclusive), tended to show that the collision in question occurred at a point on petitioner's line referred to as Mine Junction or Mine Switch, near Francisco, Indiana, at which point there was a switch connecting defendant's main line with the track of the Evansville Company. At that place petitioner's road extends approximately east and west, and the track of the Evansville Company connects therewith leading off toward the west on the south side of petitioner's track and curving to the south. This track of the Evansville Company extends back to a mine about three-quarters of a mile distant, and from the point of this switch connection

the Evansville Company operated its trains and cars eastwardly over petitioner's main line to Oakland City, a point six or seven miles east thereof, under a contract and working arrangement with the petitioner. At Oakland City there was another connection with the Evansville Company's track (Tr., p. 73). At the Mine Junction switch there was a switch stand operated in conjunction with a signal light upon a tall stand which stood across the track from the switch stand and was connected therewith by a throw rod so that when the switch lever was operated the light stand would be turned so as to change the light from green to red, or vice versa, when the mechanism was operating normally.

On the night of September 2nd, about thirty or thirty-five minutes prior to the collision in question, according to defendant's evidence, a freight train of the Evansville Company, which had been operated between Mine Junction switch point and said mine, was standing on the switch track leading off from this switch. It was the intention of the crew to take the train east over petitioner's track to Oakland City. The crew consisted of one Hughes, who was the conductor, an engineer, a fireman and two brakemen, namely, one Carson and one Stanley (Tr., pp. 73, 74). The freight train was headed east, the engine being in front of the train and two or three car lengths from said switch connecting that track with petitioner's main line (Tr., p. 76). While it was standing in that position one of petitioner's freight trains, an

extra, passed, going west. Hughes, the conductor of the freight train of the Evansville Company, testified that after petitioner's extra freight had passed, he went into a telephone booth nearby and called petitioner's train dispatcher at Preston for running orders to Oakland City; at which time both of the brakemen were there close to him; that the dispatcher gave him running orders to Oakland, and that he then said to Corson, one of the brakemen, "all right"; but that he then thought about No. 2 passenger train—the train upon which respondent was a passenger—and looked at his watch and saw that they did not have much time to make it to Oakland City before No. 2 would arrive there, whereupon he told Carson to ask the engineer "if he could make Oakland City for No. 2" (Tr., p. 75); that Corson went and made this inquiry of the engineer and came back and said, "No," and that he (Hughes) then called the dispatcher again and told him they would remain where they were until No. 2 had passed (Tr., p. 75). And Hughes said that when he came out of the booth he looked at the switch light and target and they showed green, indicating a clear track on petitioner's line, and he then walked a few feet away and sat down and remained there until the passenger train arrived and "hit the switch"—"took the switch"—and went into the freight train of the Evansville Company standing on the side track (Tr., pp. 75 and 76). Hughes said that there were six or seven cars on the passenger train and all of them went in on the

siding but the rear car, the rear trucks of which were sitting right on the switch points; and that when they went back to the switch they found that the throw rod had become disconnected from the bottom of the switch stand; that the throw bar had dropped down at the bottom, and if it had not been disconnected the light would have shown red (Tr., p. 78).

On cross-examination Hughes said that the brakeman Carson left the switch open, thinking they were going to use the Southern tracks, and that during the entire twenty or twenty-five minutes the witness and his crew were right there in the vicinity, and that during that entire time the switch, which should have been closed in order to permit the Southern train to go through, was allowed to remain open (Tr., p. 79). And he said that Carson could have told whether the switch was closed or not by looking at the switch points; that he knew that the Southern passenger train was due in a short time; that it was customary for the Evansville Company to use the Southern tracks and for employes of that company to open and close the switches as they saw fit, and as they thought necessary (Tr., p. 81).

Carson, as defendant's witness, testified that he unlocked and opened the switch in question when Hughes called to him, saying, "All right," after the latter had called up the train dispatcher; that this meant that they were to go ahead to Oakland City on the Southern track ahead of No. 2; that when he (Carson) unlocked the switch and threw

it, the points fitted up all right, but he paid no attention to the light, "which was on the other side, about fifteen feet high" (Tr., p. 87); that when he got the switch in line, Hughes said: "No. 2 is on time, ask the engineer if we can make it to Oakland"; and that he (Carson) then went to the engine on the sidetrack, about three car lengths west of the switch point, asked the engineer if they could make it to Oakland, and that the engineer said: "We better not try it." And Carson testified:

> "I turned around, with nothing on my mind but lining that switch up; first thing I noticed was a green switch light; well, I would have knowed there was something wrong if I hadn't left the conductor out ahead and brakeman beyond, and I just figured one of them had lined it back, see?" (Tr., p. 88.)
>
> • • • • • • • •
>
> "Turned around, not thinking nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch; never thought practically anything about it; just thinking one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was" (Tr., p. 88).

On cross-examination this witness testified that when he opened the switch he looked at the switch points, but paid no attention to the light. He further testified that any other sort of examination, when he walked back from the engine, if he had made it, would have determined, absolutely, the fact that the switch was open for the South-

ern train, but that he "just crossed over the track and walked up the other side of the track and sat down"; that he had plenty of time to look at the switch points if he had wanted to (Tr., p. 91); that the switch light involved was a "Southern light," and was on Southern property (Tr., pp. 94 and 95).

**Stanley**, the other brakeman, testified that after the wreck he found the switch open and the light showing green and, upon examining the light standard, he found the connecting rod off the target rod (Tr., p. 93).

One **Vieth**, petitioner's supervisor of bridges and buildings, testified that he was on train No. 2; that after the collision the switch lever was in proper position for the switch to be open to the siding; that after daybreak he made an examination and found that the lever or crank of the light stand was fastened to the connecting rod but was off of the upright (Tr., p. 99). He made a rough drawing of the "crank" that connected the throw rod with the upright of the light stand, introduced as Petitioner's Exhibit 3 (Tr., p. 135), but his testimony (Tr., pp. 99 to 102, inclusive) is such as to make it impossible to identify the various things in such drawing to which he referred from time to time by saying "this," "here," etc. (indicating); that he observed a fresh crack in the crank, about opposite the set screw which held it to the upright of the light stand, and said that this crank would take the tension off the sides and finally let the crank drop off (Tr., p. 101).

On cross-examination, referring to the set screw designed to hold the crank to the upright, he said that it "was in there about one-sixteenth of an inch." He said that the set screw "had protruded" far enough to hold; that the thing could have been prevented by having a bolt hole drilled through the bottom of the shaft, according to a "design" referred to, with the crank properly secured to the shaft by means of a bolt; that "by drilling a bolt hole in there, according to the design, and the crank properly secured to the shaft by means of a bolt, that would have prevented this sort of occurrence"; and that another way they could have prevented it "would be by having the counter bore in the shaft properly countered or centered, so as to receive this set screw" (Tr., pp. 104, 105).

One **Beard**, the conductor of petitioner's train that was wrecked, testified that after the casualty he looked about to find out why the light did not show red, and found that the rod that went over to connect with the upright of the switch light was disconnected at the bottom (Tr., p. 107); that he put his hand under there and found that the set screw was at least one-sixteenth of an inch inside; that he tried to turn the set screw with his fingers, but it was rusted and would not turn.

One **Larson**, defendant's section foreman, whose duty it was to inspect the switches once a week, testified that he inspected this switch on September 2nd and did not discover anything out of order (Tr., pp. 110, 111). On cross-

examination he said that two or three days, or perhaps one day, before the casualty he found that the bridle rod at this switch, which was fastened to the switch points, and operated them, had been bent and damaged by something dragging on a train, and that the throw rod attached to the switch stand had also been damaged, and he took it off (Tr., pp. 111 and 112).

Petitioner offered in evidence the contract between it and the Evansville Company respecting the connection at Mine Point Junction, but on objection of plaintiff's counsel it was excluded (Tr., p. 115). The same is set out on pages 115 to 124 of petitioner's transcript.

Petitioner also introduced in evidence the sections of the Indiana statute pleaded in the answer.

## III.

## SUMMARY OF ARGUMENT.

### POINT 1.

### (a)

The evidence adduced by respondent, showing that he was a passenger on petitioner's train and was injured, without fault on his part, by reason of the train running into a siding or switch track and coming into collision with another train standing thereon, made a prima facie case of negligence on the part of petitioner, under the res ipsa loquitur rule, and cast the burden on petitioner to

show that such collision and injury resulted from inevitable accident or some cause against which human care and foresight could not have provided.

Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115;
N. J. R. & T. Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877;
Gleeson v. Va. Midland Ry. Co., 140 U. S. 370, 35 L. Ed. 458;
Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658, l. c. 663, 45 L. Ed. 361, l. c. 364;
Sweeney v. Erving, 228 U. S. 233, 57 L. Ed. 815;
Kirkendall v. Union Pacific R. Co., 200 Fed. 197;
Murphy v. Milford, A. & W. St. Ry. Co., 210 Fed. 137, 138;
Patterson v. Traction Co., 213 Fed. 289, 291;
Lee Line Steamers v. Robinson, 218 Fed. 559, 563;
Lee v. K. C. So. Ry. Co., 220 Fed. 863;
Wiley v. Grand Trunk Ry., 227 Fed. 127, 129;
Chicago, R. I. & P. Ry. Co. v. Eddy, 228 Fed. 643, 645;
Chicago, M. & St. P. Ry. Co. v. Irving, 234 Fed. 562;
So. Pac. Co. v. Hanlon, 9 Fed. (2d) 294;
Lehigh Valley R. Co. v. Ciechowski, 10 Fed. (2d) 82 (certiorari denied 270 U. S. 654, 70 L. Ed. 783).

(b)

The evidence adduced by petitioner did not and could not overthrow respondent's prima facie case so as to warrant a directed verdict. When all the evidence was in, it was for the jury to say whether the petitioner had rebutted

respondent's prima facie case. The explanations sought to be made by petitioner were matters of defense for the consideration of the jury.

Gleeson v. Railroad Company, supra, 140 U. S. 370, 35 L. Ed. 458;
Chicago, M. & St. P. Ry. Co. v. Irving, 234 Fed. 562, 567, 569;
Lehigh Valley R. Co. v. Ciechowski, 10 Fed. (2d) 83, 84;
Chicago, R. I. & P. Ry. Co. v. Eddy, 228 Fed. 643, 647;
And other authorities cited under Point 1 (a), supra.

## POINT 2.

Under the evidence adduced, showing that petitioner, under its working arrangement with the Evansville, Indianapolis & Terre Haute Railway Company, with respect to the connection at Mine Point Junction, undertook to delegate to the latter company the duty to attend, manage and operate the switch and signal light in question, which constituted an integral part of petitioner's road, the operation of which affected the safety and security of petitioner's track for the transportation of its passengers, petitioner is liable for injuries to its own passengers due to the negligence of the agents and servants of such other company in the operation and management of such switch and signal light, as though such agents and employes were its own agents and employes, and regardless of the terms of the operating contract or arrangement

between the two companies and of the Indiana Statutes relied upon by petitioner.

Illinois Central R. Co. v. Barron, 5 Wall. 90, 72 U. S. 412, 18 L. Ed. 591;
McElroy v. Nashua etc. R. Co., 4 Cush. (Mass.) 400;
Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 49 L. R. A. 77;
Chicago Rys. Co. v. Kramer, 234 Fed. 245;
Penn. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141;
Maumee Valley R. etc. Co. v. Montgomery, 81 Ohio St. 426, 91 N. E. 181, 26 L. R. A. (n. s.) 987;
Quigley v. Toledo Rys. & Light Co., 89 Ohio St. 68;
Nelson v. Vt. etc. R. Co., 26 Vt. 717;
Murray v. Lehigh Valley R. Co., 66 Conn. 512, 32 L. R. A. 539;
Biddle v. Riley, 11[illegible]k. 206, 176 S. W. 134, L. R. A. 1915 F 192;
Central Trust Co. v. D. & R. G. R. Co., 97 Fed. 239, 242;
Eddy v. Letcher, 57 Fed. 115;
Union Pac. Ry. Co. v. Harris, 63 Fed. 801, 158 U. S. 326, 39 L. Ed. 1003;
Keep v. Railway, 10 Fed. 454;
10 Corpus Juris, pp. 879, 880, Sec. 13[illegible]6.

## POINT 3.

The testimony adduced by petitioner afforded ample proof of its own negligence in respect to the equipment and maintenance of the mechanism of the switch stand and signal light at the switch point in question, directly affecting the safety and security of the track over which

petitioner undertook to transport respondent as a passenger, in that such testimony showed that petitioner relied upon old equipment, with a rusty set screw to hold the "crank" to the shaft or upright of the signal light, by friction merely, when such connection could have been safely and securely made by merely counterboring such shaft where the set screw protruded, or by putting a bolt through the shaft according to the design referred to at the trial (Tr., pp. 104, 105). The jury was not required to believe the testimony as to a crack in the crank. And there was such crack, and if that had aught to do with the connecting rod becoming loose from the upright of the light standard, under the testimony adduced the jury was well warranted in finding that such crack occurred a day or two prior to the casualty when the bridle rod and one of the throw rods were damaged by something dragging on the track, and that a reasonable and proper inspection would have revealed the same (Tr., pp. 111-112).

Furthermore, the connection could have been made absolutely safe, regardless of any such crack, by the simple means mentioned above (Tr., pp. 104, 105).

## POINT 4.

The authorities relied upon by petitioner involving the question of liability of a lessor railroad company for the negligent operation of a road or portion thereof leased to the latter, where such lessor, by legislative authority, leases its entire road or some portion thereof with roll-

ing stock and equipment and parts with the possession and control thereof (e. g., Arrowsmith v. Railroad, 57 Fed. 165, and cases following the same; Moorshead v. United Railways Co., 119 Mo. App. 541, and other cases of like character), have naught to do with the question here involved, but are far afield. Nor are any of petitioner's other cases here in point, since none of them involve the question of the liability of a railroad company to its own passengers for injuries received as a result of the negligent maintenance or operation of an appliance or mechanism constituting an integral part of such carrier's road, the negligent maintenance or operation of which would necessarily imperil the safety of passengers being transported by it over such road.

## POINT 5.

There is a wide distinction between a case in which the lessor company, by an authorized lease, parts with complete possession and control of its road, and one in which, by lease or otherwise, there is a joint or common use of such road or a portion thereof by the two companies.

1 Elliott on Railroads (3d Ed.), Sec. 533, p. 770, Section 541, p. 779.

## IV.

## ARGUMENT.

(1)

This is a simple case involving liability of a common carrier by railroad to its own passenger for injuries sustained by the passenger in a collision due to the carrier's negligence. Petitioner undertook to transport respondent safely from Louisville, Kentucky, to St. Louis, Missouri, and while respondent was a passenger upon petitioner's train the train was allowed to run into a switch negligently permitted to remain open on petitioner's main-line track, by reason whereof the train took a sidetrack and came into violent collision with an engine and train of freight cars, resulting in respondent's injuries.

Nothing is better settled in the law than that in passenger and carrier cases proof of a collision or derailment of the train or car upon which the passenger is riding, resulting in injury to him, constitutes prima facie evidence of negligence on the part of the carrier, under the res ipsa loquitur rule, and casts the burden upon the carrier to show that such injury resulted from inevitable accident or some cause against which human care and foresight could not have provided. And in such cases not only does proof of the occurrence itself cast upon the defendant carrier the burden to exculpate itself, to show that its whole duty was performed and that the injury could not have been

avoided by the highest degree of care on its part—by the utmost human care and foresight—**but when the injured passenger, as plaintiff, has thus made out his prima facie case, and the defendant carrier comes forward, if it does, with evidence for the purpose of explaining the casualty and attempting to exonerate itself, the case remains one for the jury.** Though the plaintiff adduces evidence merely to show the relation between passenger and carrier, the occurrence itself, and his consequent injury without negligence on his part, and though the evidence in behalf of the defendant carrier tending to exonerate it stands uncontradicted, a verdict will not be directed for the defendant, but the issue of liability is one for the jury under all the evidence. Such is the applicable rule of law, firmly established by the decisions of this and other courts.

In **Gleeson v. Virginia Midland Railroad Co.**, 140 U. S. 443, 35 L. Ed. 548, this Honorable Court said:

> "Since the decisions in Stokes v. Saltonstall, 13 Pet. 181 (10 L. Ed. 115), and Railroad Company v. Pollard, 22 Wall. 341 (22 L. Ed. 877), it has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in Inland & Seaboard

Coasting Co. v. Tolson, 139 U. S. 551 (11 Sup. Ct. 653, 35 L. Ed. 270)."

* * * * * * *

"The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matters of defense, and it is for the jury to say, in the light of all the testimony and under the instructions of the Court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

The Gleeson case and the authorities there cited have been followed time and again by the federal courts. (See Chicago, M. & St. P. Ry. Co. v. Irving, 234 Fed. 562, l. c. 568, 569; Lehigh Valley R. Co. v. Ciechowski, 10 Fed. [2d] 82, l. c. 84, and other authorities cited under point 1 of respondent's summary of argument, supra.)

In the instant case respondent made out his prima facie case by showing the relation of passenger and carrier, the collision and his consequent injury. Petitioner adduced evidence in an effort to rebut the prima facie case of negligence so made. If it be assumed, arguendo, such evi-

dence tended to exculpate petitioner, in that it tended to show that the injury was occasioned by no negligence or breach of duty on its part or on the part of those for whose acts it was responsible (which respondent stoutly denies), respondent submits that under the law applicable to that situation petitioner was not in any event entitled to a directed verdict; that it was for the jury to believe or disbelieve the testimony of petitioner's witnesses by way of explanation, and that when all of the evidence was in it remained for the jury, guided by the Court's charge, to say whether petitioner had rebutted respondent's prima facie case.

(2)

But, respondent submits, the evidence adduced by petitioner, instead of tending to acquit it of negligence, affirmatively established negligence on its own part in negligently maintaining the switch and signal mechanism at the point in question in an unsafe condition for operation, as well as the plainest sort of negligence on the part of the agents and servants of the Evansville, Indianapolis & Terre Haute Railway Company, for whose negligence, respondent contends, petitioner is clearly liable under the circumstances of the case. We desire, first, to direct the Court's attention to some of the pertinent matters developed by petitioner's evidence showing the negligence of the agents and servants of the Evansville Company in the operation of this switch and signal device.

About half an hour before petitioner's passenger train No. 2, on which respondent was a passenger, was due at Mine Junction, the crew of the freight train of the Evansville Company, then standing on the switch or side track at that point near petitioner's main-line track, were ready to proceed eastwardly over petitioner's main track to Oakland City. Hughes, conductor of that freight train, telephoned to defendant's train dispatcher, who issued orders for the running of the trains of the Evansville Company over the road as well as those of defendant, asking for running orders to Oakland City. This was just after one of petitioner's through freight trains had passed going west. Hughes was given such running orders and at once called to Carson, a brakeman, saying, "All right"; whereupon Carson proceeded to throw the switch lever and open the switch leading to the side track. Hughes then immediately told Carson to ask the engineer if he had time to make it to Oakland City, and Carson at once walked to the engine, not more than three car lengths away, made such inquiry, and was told by the engineer that he did not think that they had time to make it, **whereupon Carson immediately turned around and observed that the light on the switch stand showed green, but paid no more attention to the switch which he had just opened.** Without examining the switch points to see if the switch had been in fact closed, and without asking whether anyone else had closed the switch, he calmly sat down and waited until the wreck occurred. Indeed, he said that when he turned and saw

that the light was green—when it should have been red as he had just opened the switch—**he never thought practically anything about it.**

**After opening the switch and being told to speak to the engineer, it could have taken Carson but a few seconds to reach the engineer. He says that when he turned around and observed that the light signal showed green he thought that someone else must have thrown the switch back and closed it. Just how he could have thought this, in view of the fact that he had just opened the switch at the conductor's order, both of them expecting the train to go, and neither the conductor nor the other brakeman could have known that they were not going to pull out upon the main track until Carson reported what the engineer had to say.** Having had Carson open the switch and having sent him to get the engineer's opinion as to whether they could make it to Oakland City, certainly the conductor would not have closed the switch, nor would he have had anyone else close it while Carson was walking to the engine. And though the open switch was a deadly menace and did, according to this record, cost at least two lives, as well as injuries to others, neither Carson nor Hughes paid any attention whatsoever to the fact that ought to have been obvious to anyone, that the green light under the circumstances plainly indicated that something had gone wrong with the switch mechanism.

Hughes likewise observed that the light was green, whereas he had just had Carson open the switch, but he

also dismissed the matter from his mind. Neither of them looked at the switch points or made the slightest investigation. Obviously, the situation was enough to have suggested to any reasonably prudent man the necessity of looking to see whether or not this switch was, in fact, closed in order to insure the safety of trains moving on the main track. Having opened the switch, it was their imperative duty to see that it was closed.

As to the negligence of these employes the Court of Appeals, in its opinion, said:

> "The circumstances are that, a while after the switch was opened, the conductor and the brakeman (who had opened the switch) each looked at the light and it evidenced that the switch had been closed, while the second brakeman, who was with them near the switch, made no satisfactory explanation as to why he did not close the switch. It was a fair question whether any of these three men exercised the highest degree of care in protecting the switch."

(3)

But it is the contention of petitioner that it is not responsible for the negligence of the agents and servants of the Evansville Company. This contention, respondent submits, is wholly without merit. As a carrier of passengers, petitioner was bound to exercise the highest degree of care and the utmost diligence, not only in the care and management of the train on which petitioner was a passenger, the

maintenance of its track and roadbed, but in the maintenance and operation of all incidental and subsidiary appliances, equipment and arrangements appurtenant to its road and connected and used therewith, having to do with the safety of the carriage of passengers which it undertook to transport. As the switch stand, signal device and connecting mechanism constituted an integral and important part of petitioner's road and equipment, and the proper maintenance and operation thereof were obviously essential to the safety and security of the passengers which petitioner undertook to carry over its main track, it was petitioner's duty, and petitioner was charged with the highest degree of care and foresight to see that the switch stand and signal light were not only properly and safely maintained in good working order, but properly attended, managed and operated, to the end of securing the safety of passengers on its trains passing over its road at this point. This duty petitioner could not shift or delegate so as to relieve itself of liability by reason of its nonperformance. And no contract or operating or working arrangement between petitioner and any other company, whereby the latter was permitted to use and operate this switch and signal device in connection with its operation of a portion of petitioner's road or otherwise, could, by any possibility, relieve petitioner from the duty owing to its passengers to see to the proper operation and management thereof. And when petitioner undertook to leave the operation of this switch and signal device to the em-

ployes of the Evansville Company, it made such employes, in legal effect, its own agents and employes for that purpose, making petitioner liable for the acts of such employes precisely as though they were its own agents and employes. The law anent that matter does ont, respondent submits, rest in any doubt whatsoever.

In the leading case of Illinois Central Railroad Company v. Barron, 5 Wall. 90, 18 L. Ed. 590, the deceased, for whose death the action was brought, was a passenger on a car of the defendant Illinois Central Railroad Company, and was killed by reason of a collision between that car and an express train of the Michigan Central Railroad Company. The defendant Illinois Central was the owner of the road and was transporting plaintiff as a passenger thereon, but had "contracted or leased to the Michigan Central the privilege of running trains on that part of its road. This Court, in its opinion, said:

> "It was insisted at the trial, in behalf of the defendants, that the express train was wholly in fault and responsible for the injury. But the Court ruled that, considering the facts to be as claimed, still the defendants were liable, and this presents the first question in the case.
>
> "It will be observed the defendants owned the road upon which they were running the car in which deceased was a passenger at the time of the collision, and that the train in fault was running on the same road with their permission.
>
> "The question is not whether the Michigan company

> is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility. The question has been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable (citing Illinois cases). The same principle has been affirmed in other states (Nelson v. Vt. etc. R. Co., 26 Vt. 717; McElroy v. Nashua etc. R. Co., 4 Cush. 400)."

Petitioner, in its brief, seeks to make it appear that this Court, in the Barron case, supra, simply applied the local law of Illinois, holding a lessor road liable for the negligent operation thereof by a lessee where the Legislature had not expressly or impliedly given railroad companies authority to lease their roads and relieve themselves from liability. But, as pointed out in the Court of Appeals in its opinion in this case, this Court, in the Barron case, referred to three Illinois decisions, in only one of which (Ohio etc. R. R. Co. v. Dunbar, 20 Ill. 623) was the decision based upon the ground that the contract of the railroad with the other carrier was made without legislative consent. And in the Barron case this Court cited two decisions from other states, namely, Nelson v. Railroad, 26 Vt. 717, and McElroy v. Railroad, 4 Cush. (Mass.) 400, to which we shall later refer. And the Court of Appeals, in the instant case, said:

> "It is therefore clear that the approval in the Barron opinion could not have been based solely upon lack of legislative consent to a lease."

The rule of law underlying the Barron case has been recognized and applied in many other cases. (See Central Trust Co. of New York v. Colorado Midland Ry. Co., 97 Fed. 239, affirming 89 Fed. 560; Denver & R. G. R. Co. v. Roller, 100 Fed. 738, 745, and other authorities under point 2 of respondent's summary of argument, supra.)

The Court of Appeals, in the instant case, quoted from the opinion of Judge (later Justice) Brewer in the Colorado Midland case, 89 Fed. 563, as well as from the opinion of the Court of Appeals in the same case, 97 Fed. 239 (Tr., pp. 156, 157).

The Barron case, supra, and the Colorado Midland and Roller cases, and other cases that have followed the Barron case, were cases involving the **joint or common use of a track by two roads**, where the owning company did not lease the entire road and surrender all possession and control thereof to the lessee but continued to operate its own trains and carry its own passengers over the road. And the courts have consistently held that the owning road is liable to its own passengers so transported by it, due to the negligence of the road jointly occupying the track with it. There is a very marked distinction between cases of the character just mentioned and those in which it is sought to hold a lessor company liable, where, by an authorized lease, it leases its road to another company and surrenders all possession and control thereof. (See 1 Elliot on Railroads [3rd Ed.], Sec. 551, p. 779.)

Petitioner, in the Court of Appeals, placed much reliance

upon the decision in Arrowsmith v. N. & D. R. Co., 57 Fed. 165, Moorshead v. United Railways Co., 119 Mo. App. 541, and other cases of like character, which cases are now cited and relied upon by petitioner in its brief. These are cases involving the liability vel non of a lessor railroad company which leases its entire road and equipment to another company, surrendering all possession and control thereof, such lease being authorized by legislative authority. The question of the liability of the lessor company in such cases for negligent operation by the lessee is a matter that is in nowise involved in the instant case. There is a conflict of authority as to whether, in such cases, the lessor, surrendering full possession and control, can escape liability for negligent operation by the lessee, though such lease is made with legislative sanction, where the Legislature has not expressly exempted the lessor from liability. (See Quigley v. Toledo Rys. & Light Co., 87 Ohio St. 68, 105 N. E. 185, L. R. A. 1918-E, 249.) But since the question is not one here involved, it would serve no useful purpose to discuss these cases.

(5)

In this connection, much is said by petitioner in its brief as to the effect of the Indiana statutes pleaded. At this point respondent desires to point out that Sections 12808, 13106 and 13079, Burns' Indiana Statutes 1926, set out on pages 45, 46 and 47 of petitioner's brief, were not pleaded in petitioner's answer below and were not, of

course, offered in evidence, and are not in this case. The sections of the Indiana statute pleaded are Sections 12931, 13206, 13207 and 13208 of Burns' Annotated Statutes 1926 (pages 16 and 17). As to the effect of these sections, it may be said, for one thing, that since this petitioner is a Virginia corporation (Tr., p. 9) and not a corporation under the laws of the State of Indiana, and since the Indiana statutes pleaded are statutes providing for the incorporation of railroad companies under the laws of that state, prescribing their powers, etc., it is difficult to see how the rights or liability of petitioner are in any way affected by such statutes. But if we assume that under such statutes petitioner was required to permit another railroad company to connect with its line, **it is entirely obvious that these statutes did not and could not by any possibility relieve petitioner from liability to its own passengers by reason of the negligent operation of a switch and signal device necessary to the safe operation of petitioner's trains.**

**Assuming that petitioner was required to afford another road a connection at Mine Junction, neither the Indiana law nor any other law contemplated or could contemplate that petitioner would have the right to turn over to the employes of such another road, or to anyone else, the duty to operate its switch and signal device on its own main-line track, for the operation of its own trains, carrying its own passengers, without being liable to its passengers for the negligent operation of such device, just as though the persons operating it were its own employes.**

The case at bar is, indeed, a much stronger one than the Barron case, the Colorado Midland case or the Roller case referred to above. Here the injury did not occur through **the negligent operation of a train** by a railroad having running rights on the road, but **occurred through the negligent maintenance and operation of petitioner's own switch stand and signal device, constituting as much an integral part of its road as did the rails, roadbed or bridges.**

The case of **McElroy v. Railroad**, 4 Cush. (Mass.) 400, is here directly in point, or, as the Court of Appeals in its opinion herein said, is "on all fours" with this case (Tr., p. 155). In that case the casualty occurred by reason of the negligent operation of a switch, which, under an arrangement between the defendant and another road, was provided for and attended by a servant of the latter company at its expense. The Court said:

> "As passenger carriers the defendants were bound to the most exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of passengers. The wife having contracted with the defendants and paid fare to them, the plaintiffs had a right to look to them, in the first instance, for the use of all necessary care and skill. The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendant's road, over which they must necessarily carry all their

passengers; and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell Railroad, and it was within the scope of their duty to see that the switch was rightly constructed, attended and managed, before they were justified in carrying passengers over it."

Nelson v. Railroad, 26 Vt. 717, is a case of like character.

What is said by petitioner in its brief as to the powers of the Interstate Commerce Commission over railroads does not call for even passing notice. It is certain that neither under the laws of Indiana nor under any authority of the Interstate Commerce Commission was petitioner required to permit the switch and signal device in question to be operated by the employes of another road without any supervision or control thereover by petitioner. And, we submit, it is equally certain that when petitioner permitted the employes of another road to operate this switch, upon the proper operation of which depended the lives and safety of its own passengers, it made such employes for that purpose its own employes, and became liable for their negligent operation thereof.

(6)

But there is still another phase of this case which, respondent submits, disposes of all petitioner's contentions adversely to it. The evidence adduced by defendant

showed its own negligence in the maintenance and care of this switch and light signal mechanism. It was petitioner's own switch and signal stand on its own property (Tr., pp. 94, 95) and an essential part of its equipment. It was, in fact, maintained (though negligently maintained) by petitioner. Petitioner's employes inspected and repaired it (Tr., pp. 109-112, incl.). It is stated in petitioner's brief (Tr., p. 20) that the Evansville Company undertook to maintain "this connection" at its own cost and expense under the contract offered in evidence. This contract was excluded, for the obvious reason that it had no tendency to relieve petitioner of liability, but an examination thereof (Tr., pp. 115 to 124, incl.) will reveal that there is no provision therein requiring the Evansville Company to maintain and keep in order the switch and light stands and their connecting mechanism. The duty of this petitioner to its passengers was to exercise the highest degree of care, the utmost human diligence and foresight, to keep this this appliance in good and safe working order at all times. The evidence shows, however, that at the point beneath the light standard where the connection was made between the so-called crank and the upright of the standard, petitioner relied upon this connection being securely and firmly made by having a little set screw to hold the crank to the upright by friction merely, and that the equipment was old, rusty and out of date. And petitioner's expert witness, Vieth, testified positively that the occurrence in question could have been avoided by simply having the upright

or shaft, to which the crank fitted, countersunk beneath the set screw; and that the casualty could have been avoided by boring a little hole into the shaft and putting in a bolt, in accordance with the design referred to at the trial, whereby a firm connection would have been absolutely assured. Touching this matter the Court of Appeals, in its opinion in this case, aptly said:

> "The direct negligence of the appellant was in the maintenance of a safe appliance at the switch so that the switch light would turn to indicate the condition at that point. It was a vital matter that the switch light should indicate this condition. And the evidence showed that the appliance had been long in use and could very easily have been made safe and that, if it had been so constructed, the accident would not have occurred" (Tr., pp. 158, 159).

In petitioner's brief, page 22, it is said that investigation revealed that the failure of the signal to operate properly was due to a fresh "break" in the connection between the light standard and the lever which opens and shuts the switch. We wish to respectfully call attention to the fact that there is no evidence whatsoever of any break in the connecting rod, crank, or other part of the mechanism. Indeed, the word "break" nowhere appears in the testimony. All of the testimony is that the lever or crank at the base of the light standard was disconnected from the upright. It was fastened to the connecting rod, but was off of the upright. (Tr., pp. 93,

99, 107). Neither the crank (or lever) or connecting rod was broken. The witness Vieth, an employe of petitioner, testified that he found a fresh crack in the crank. What this crack amounted to, if it existed at all, is not shown. The crank was not brought into court and exhibited. The testimony as to the existence of the crack was that of an interested witness. And there is no evidence other than the opinion of this witness that such a crack could have caused the crank to drop off, and certainly none that it did cause it to do so. If the crack existed at all it was a pure matter of speculation as to whether it had anything to do with the crank becoming disconnected from the upright of the light standard. If such testimony may be said to have any probative force, it was for the jury to believe or disbelieve it, or to give such weight thereto as the jury might see fit. Furthermore, since the evidence showed that a great deal of damage had been done to this mechanism a day or two prior to the casualty, the bridle bars and one connecting rod being damaged, the jury could well infer that if there was any such crack it was caused at that time and that a proper inspection would have revealed it.

But apart from all this, the testimony of the witness Vieth, on cross-examination, is to the effect that, despite any such crack, **this connection could have been firmly and securely made by simply counter-boring the shaft or upright, or by putting in a small bolt to make the connection firm and safe.** Is it, we ask, the exercise of the

highest degree of care, the utmost human diligence and foresight, for the safety of passengers, to use an old, out-of-date signal device in which a vital connection is made by a rusty set screw, holding by friction merely, when there are simple and absolutely safe means at hand for making such connection firm and secure? Obviously, as the Court of Appeals held, the question of defendant's own negligence in the maintenance of this appliance was one for the jury.

Respondent submits that the learned author of the opinion of the Court of Appeals has fully and correctly disposed of every contention of petitioner (Tr., pp. 151-159); and that, indeed, all such contentions were likewise completely disposed of by the memorandum of the learned District Judge before whom this case was tried below, in ruling upon petitioner's motion for a new trial (Tr., pp. 145-148).

For the reasons shown above, respondent prays that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

SOUTHERN RAILWAY COMPANY,
Petitioner,
vs.
JACK W. HUSSEY,
Respondent.
No. 342.

## SUPPLEMENTAL BRIEF FOR RESPONDENT.

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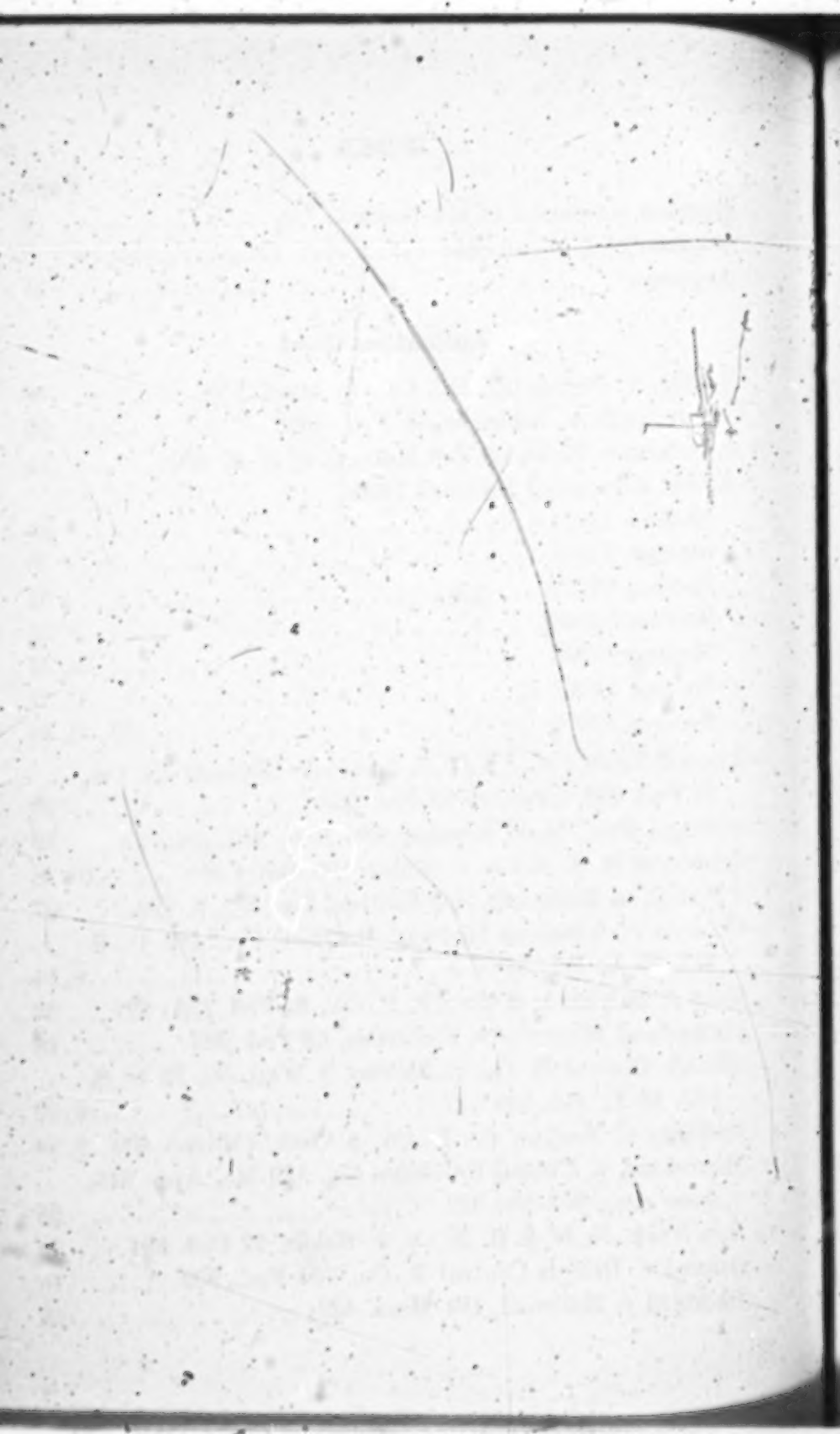

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JACK W. HUSSEY,
Respondent.

No. 342.

## SUPPLEMENTAL BRIEF FOR RESPONDENT.

Because of statements made by petitioner, in its "Restatement of the Facts and Argument" in its supplemental brief, which, in the opinion of respondents' counsel, give an erroneous impression of the facts of the case in certain particulars, respondent deems it necessary to make a further statement of the facts in addition to respondent's "Statement of the Case" in his original brief in opposition to the petition for the writ.

## FURTHER STATEMENT OF THE FACTS.

Respondent, as plaintiff below, showed, in his case in chief, that he was a passenger upon petitioner's westbound passenger train, operated on its main line from Louisville, Kentucky, to St. Louis, Missouri, and that about 1:30 a. m. on September 3d, 1927, while respondent was asleep in his berth, the train left the main track and came into violent collision with a freight train standing upon a sidetrack, by reason whereof respondent sustained the injuries for which he sued (Tr., pp. 48, 49). Having adduced this evidence, and evidence touching the extent and permanency of respondent's injuries, respondent rested his case (Tr., p. 61).

Petitioner then adduced evidence in an effort to explain the casualty consistent with due care on its part. This evidence tended to show the following:

At the point where the collision occurred, and where petitioner's tracks extended apparently east and west, a track of the Evansville Company connected with petitioner's main track, leading off toward the west on the south side of petitioner's track and curving to the south, the connection being known as Mine Junction (Tr., pp. 77, 78, 87). At this point there was a switchstand and signal device so constructed that when the switch lever was thrown to open or close the switch, it operated, by means of a throw rod, a signal device so as to change the signal light from green to red, or vice versa (Tr., pp. 109, 110).

On the night in question, a short time prior to the time when petitioner's westbound passenger train No. 2, upon which respondent was a passenger, was due at Mine Junction, a freight train of the Evansville Company was standing on the sidetrack leading off from this switch. The crew of this freight train consisted of Hughes, the conductor, an engineer, a fireman, and one Carson and one Stanley, the brakemen (Tr., p. 78). The freight train was headed east, the engine being in front of the train and about three car lengths from the switch (Tr., p. 81).

Hughes testified that he went into a telephone booth near the switch and called petitioner's dispatcher at Preston for running orders to Oakland City, a point about ten miles east on petitioners' main line; that the dispatcher gave him such running orders, and that he then said to Carson, who was standing near by, "All right," meaning for him to throw the switch; but that he then looked at his watch and told Carson to go to the engine and ask the engineer if they could make it to Oakland City before No. 2 would arrive there; that Carson went to the engineer, made this inquiry and came back and said "No," and he (Hughes) then called the dispatcher and told him they would remain where they were until No. 2 had passed (Tr., pp. 79, 80). Hughes said that when he came out of the booth he saw that the light in the signal target showed green, indicating that the switch was closed and that the petitioner's main-line track was clear, and then walked a few feet away and sat down and

remained until passenger train No. 2 arrived, "took the switch" and crashed into the freight train (Tr., p. 80).

Other evidence for petitioner went to show that the throw rod leading from the switch stand to the signal device had become disconnected from the crank of the signal stand; that when Carson opened the switch, by operating the switch lever, the throw rod should have turned the crank of the signal target so as to display a red light; but that by reason of the fact that the throw rod was disconnected from the crank, the light did not turn but continued to show green (Tr., pp. 83, 84).

Carson testified that when Hughes stepped from the telephone booth and called to him, saying "All right," he (Carson) unlocked the switch and threw it, opening it onto the sidetrack, saw that the points fitted up all right, but paid no attention to the light; that being told by Hughes to ask the engineer if they could make it to Oakland ahead of No. 2, he went to the engine about three car lengths west, made such inquiry of the engineer and was told by the engineer that they had better not try it. He said that he turned around, with nothing on his mind but lining up the switch and noticed the green light (Tr., p. 95). He said:

> "Turned around, not thinking—nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch, never thought practically anything about it, just thinking

one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was" (Tr., p. 96).

On cross-examination Carson testified that when he walked back from the engine any sort of examination, other than simply looking at the light, would have shown the fact that the switch was open; that he had plenty of time to look at the switch points if he had wanted to, but simply sat down, as did the other members of the crew, and waited for the passenger train. He also said that the switch light involved was a Southern light and was on Southern property (Tr., p. 98).

Other evidence for petitioner showed that the throw rod extending from the switch stand to the signal light was found, after the accident, disconnected from the crank of the signal stand (Tr., pp. 83, 108, 118). Such evidence also showed that this crank was held to the throw rod merely by means of a small set screw which had failed to hold on this occasion. There was no evidence as to why this little set screw had failed to hold the crank to the throw rod except such as may be inferred from the testimony of petitioner's witness Vieth, petitioner's supervisor of bridges and buildings, who said that early on the morning after the accident he made an examination of the various parts of the switch and signal device and observed a fresh crack in the crank about opposite the set screw, and that "this crack will take the tension off of the sides and finally let that (the crank) drop off."

On cross-examination, Vieth testified:

"Q. Now, this thing—thing turning or not turning; I will ask you, as an engineer, if it could not have been prevented by having a bolt hole drilled through the bottom of the shaft, according to the design, with the crank properly secured to the shaft by means of a bolt, couldn't it be prevented?

A. Well, yes, if there was a bolt hole in, but that might have been a pattern that was made before they put these bolt holes in. That is not the only one that was on the road.

Q. But by drilling a bolt hole in there, according to the design, and the crank properly secured to the shaft by means of a bolt, that would have prevented this sort of occurrence, wouldn't it?

A. Well, yes, it would.

Q. And another way you could have prevented it would be by having a counter bore in the shaft, properly countered or centered, so as to receive the set screw; is that right?

A. Well, sure, sure, if that had been put on that way, but possibly when that there was made, why, they didn't fix them that way.

Q. And another way it could have been prevented was by having an automatic block signal system?

A. Well, of course, there—all roads got that.

Q. That is what they are for, though, isn't it?

A. Well, yes, but they fail.

Q. Yes. All right" (Tr., p. 114).

One Larson, petitioner's section foreman, testified in behalf of petitioner that, in the performance of his duty, he

inspected this switch on September 2nd and discovered nothing out of order. But on cross-examination he admitted that two or three days before the accident he found that the bridle rod leading from the switch stand to the switch points had been "hit right in the middle by something dragging on the train." He first said that this had occurred more than two or three days before the collision, then said it was "just two or three days," and finally admitted that "it might have been September 1st" (Tr., p. 123). And, after testifying further on redirect examination, he testified on recross-examination that he found one of the throw rods damaged and took it off and replaced it. On further redirect examination he said that the damaged throw rod was not the one running from the switch to the light stand (Tr., p. 125).

## SUMMARY OF ARGUMENT.

### I.

Since respondent, plaintiff below, rested his case upon proof adduced by him that he was a passenger upon petitioner's train, and that while he was such passenger petitioner permitted the train to come into violent collision with another train, whereby respondent was injured, thus making a prima facie case, the burden was cast upon petitioner to show that such injury resulted from inevitable accident or from some cause against which human care and foresight could not have provided. And while the petitioner came forward with evidence for the purpose of explaining the casualty and attempting to exonerate itself, the question of petitioner's negligence remained one for the jury. It was for the jury to say, in the light of all the testimony, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating corcumstances.

Gleeson v. Virginia Midland Railway Co., 140 U. S. 443, 35 L. Ed. 548, and other authorities cited under Point I of Summary of Argument in respondent's brief in opposition to the writ.

### II.

Petitioner's own evidence fully warranted the inference that petitioner itself was negligent with respect to the

equipment and maintenance of the mechanism of the switch stand and signal light at the switch point in question, and that petitioner was negligent as well in failing to take any precautions itself to see that due care was exercised in respect to the operation of its own switch and signal device, constituting an instrumentality of carriage affecting the safety and security of petitioner's track for the transportation of its own passengers.

III.

There was abundant evidence of negligence on the part of the employes of the Evansville road.

IV.

Since the switch and signal device in question was a part of petitioner's own equipment, for the operation of its trains, and constituted as much an instrumentality of carriage as did petitioner's cars and tracks, petitioner, having taken no precautions to see that such instrumentality was carefully and properly operated, is liable for injuries to its own passengers due to the negligence of the agents and servants of another company connecting with and jointly using petitioner's tracks, in the operation and management of such switch signal for the purpose of giving signals to those in charge of defendant's train upon which respondent was a passenger.

McElroy v. Nashua etc. R. Co., 4 Cush. (Mass.) 400;
Illinois Central R. Co. v. Barron, 5 Wall. 90, 72 U. S. 412, 18 L. Ed. 591;

Denver & R. G. R. Co. v. Roller, 100 Fed. 738;
Chicago Rys. Co. v. Kramer, 234 Fed. 245;
And other authorities cited under point II of respondent's brief in opposition to petition for the writ.

V.

Nothing in the Indiana statutes pleaded, or otherwise suggested by petitioner's counsel, can operate to relieve petitioner from liability to its own passenger for injuries received by reason of the negligent operation of its own switch and signal device, constituting an instrumentality of carriage appurtenant to its own main line over which it was carrying respondent as a passenger; since neither by these statutes or otherwise was petitioner required or authorized to turn over to any connecting road the operation and management of such switch and signal device, without exercising any supervision thereover, and without taking any precautions whatsoever to see that such instrumentality was carefully and properly operated for the protection of its own passengers being transported by it over such main line. The authorities cited by petitioner in this connection are readily distinguishable from the case at bar.

## ARGUMENT.

### I.

Petitioner, in its supplemental brief, begins its "Restatement of the Facts and Argument" with the statement that "Undoubtedly the primary cause of the accident was a fresh break in the mechanism which connected the signal light with the switch lever."

Respondent challenges this statement on more than one ground. In the first place, there was no showing, even by petitioner's evidence, that there was any fresh "break" in the mechanism, i. e., in either the throw rod running to the switch stand or in the crank of the switch stand to which the throw rod was connected. The word "break" does not appear anywhere in the testimony. There is simply the testimony of Vieth, petitioner's employe, an interested witness, called by petitioner in defense, to the effect that his examination, after the accident, showed a fresh crack in the crank of the signal stand, where the crank fitted onto the throw rod extending over from the switch stand. And he gave it as his opinion that this crack would take the tension off and finally let the crank drop off.

We respectfully say that the petitioner, in its supplemental brief, makes the mistake of assuming that the matters so testified to by its witness are to be taken as facts absolutely established in the case. Such testimony was adduced by the petitioner after respondent had made a prima facie case for the jury, in an effort by petitioner to

explain the casualty consistent with due care on its part, and thus attempting to exonerate itself from liability. There was no other testimony as to the existence of any such crack, nor was there any evidence whatsoever adduced that the set screw designed to hold the crank to the throw rod failed to perform its function because of the existence of any such crack, if any. This witness simply gave it as his opinion that the existence of such a crack would take the tension off so as to prevent the set screw from holding the crank to the throw rod and thus let the crank drop off. Nor is there a word of testimony in the record as to when this crack occurred, if any such crack ever existed.

The jury were entitled to disbelieve and wholly reject the testimony of this interested witness as to the existence of any such crack, as well as to what effect it might have. But not only this, Larson, petitioner's inspector, ultimately admitted that not more than two days before the collision, and possibly a day before, a dragging beam upon a train had so damaged the apparatus at this switch as to injure the bridle rods running to the switch points, and also one of the throw rods, so as to make it necessary to remove the latter. This was dragged out of the witness on cross-examination by respondent's counsel. He first said that his inspection on the day before the accident revealed nothing whatsoever wrong with the switching and signaling device, but he was finally forced to admit that shortly prior to the casualty here in question a great deal of dam-

age had been done to this apparatus. One throw rod was so badly damaged that it had to be removed. And if there was in fact any crack in the crank fastened to the other throw rod, the jury could readily infer that this was caused by the dragging beam a day or two before, which badly damaged other parts of the same mechanism, and that Larson had negligently failed to discover it. It would be much more reasonable to suppose that the crack, if it existed at all, was caused by this violence rather than from the mere throwing of the switch lever, since the strain upon the throw rod in turning the crank of the signal light could not have been great, and the crank had never been thereby previously injured. The jury, if they believed Vieth's testimony at all, were entirely warranted in inferring that if there was any such crack it resulted from the previous violence mentioned, and that petitioner's inspector, Larson, would have discovered it on September 1st if he had made a proper and careful inspection of all parts of the mechanism.

Indeed, while we refer to this evidence because of the fact that petitioner insists upon treating this case as though the matters testified to by its witnesses are to be taken as facts absolutely and conclusively established in the case, such discussion so provoked by petitioner's learned counsel is beside the case. **Respondent pleaded and tried this case upon the res ipsa loquitur rule. Respondent, as plaintiff below, neither alleged any specific acts of negligence nor attempted to prove any.** Respond-

ent made a case for the jury by simply showing that he was a passenger on one of petitioner's passenger trains and that petitioner negligently allowed the train to leave its main track so as to come into violent collision with a freight train upon a siding whereby respondent was injured. Respondent thereby made a perfect case under the res ipsa loquitur rule. And respondent having made such prima facie case, the burden was at once cast upon the petitioner to bring forward evidence, if it could, to explain the casualty to the jury consistent with due care on its part. And when the petitioner did this, and its evidence was all in, the case remained one for the jury. **It was for the jury to say, in the light of all the testimony, whether the petitioner had successfully carried this burden and had shown, to the jury's satisfaction, exonerating circumstances warranting a verdict in its behalf. And when the case was put to the jury, as it was, on a proper charge by the learned District Judge, such questions of fact were concluded by the jury's verdict and are not now open to review.**

In Gleeson v. Virginia Midland Railroad Co., 140 U. S. 443, 35 L. Ed. 548, this Honorable Court, among other things, said:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the

act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matters of defense, and it is for the jury to say, in the light of all the testimony and under the instructions of the Court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances."

Such has been the uniform, unbroken ruling of this Court in passenger and carrier cases, as will appear from further authorities cited under point I (p. 15) of respondent's "Summary of Argument" in respondent's brief in opposition to petitioner's petition for the writ.

In this connection petitioner, in its supplemental brief, refers to **Buckland v. Railroad**, 181 Mass. 3, 62 N. E. 955, where a switch failed to operate because of a broken pin in a device connecting it with a switch tower. That case, however, is here nowise in point for the reason that **the plaintiff did not rest his case by showing facts giving rise to the application of the res ipsa loquitur rule, but went further and attempted by his own evidence to show the cause of the casualty.** The Court, at the outset of the opinion, said:

"If we assume that the plaintiff was a passenger, and might have rested his case by showing that the car in which he was riding was derailed, thus mak-

ing out a prima facie case, he did not choose to do so, but went on and showed by his own witnesses just how the accident happened."

II.

In this connection also petitioner seeks to make it appear that it should not be held liable because of the fact that one of its witnesses testified that the switch and signal device was "standard equipment." We respectfully say that the mere fact that one witness made this statement is now of no consequence in the case. For one thing, the plaintiff, as said above, had made out a perfect prima facie case for the jury, which could not possibly have been wiped out or destroyed by oral testimony adduced by defendants so as to have warranted the trial court in sustaining a motion for a directed verdict. The jury was not required to believe the statement of this witness that the equipment was standard equipment; nor does the term "standard equipment," under the circumstances, indicate that petitioner was free from fault in continuing to use old equipment of this character, in which the connection between the throw rod and the crank of the light target was made simply by means of a small set screw designed to hold the throw rod to the crank by friction merely; a method of construction which, upon the facts of this record, was evidently old and out of date at the time. While petitioner's witness Vieth said that "this switch" was standard equipment (Tr., p. 115), on cross-examination, when asked

if the casualty could not have been prevented "by having a bolt hole drilled through the bottom of the shaft, according to the design with the crank properly secured to the shaft by means of a bolt," Vieth said:

> "Well, yes; if there was a bolt hole in it, **but that might have been a pattern that was made before they put these bolt holes in. That is not the only one that was on the road.**"

From this it may readily be inferred that this old type of switch and signal apparatus, in which the throw rod was held to the crank merely by a little set screw, was no longer in general use; that it was of an old pattern in use before they began putting bolt holes in. And when the witness said that it was not the only one on the road, it is obvious that this old type was not in general use even on petitioner's own line. Again, the witness testified as follows:

> "Q. And another way you could have prevented it would be by having the counterbore in the shaft properly countered or centered so as to receive the set screw, is that right?
>
> A. Well, sure, sure, if that had been put on that way, but possibly when that there was made, why they didn't fix them that way."

This very clearly shows that the method of counterboring the shaft to receive a set screw, so as to make the connection secure, was a well-known one and one that

had been in common use, but that this particular type of equipment was an old one that had been made before safer equipment became in general use—equipment in which such a connection was made either by means of a bolt through the shaft or by countersinking the shaft to receive a set screw or bolt so as to make the connection firm and safe.

Consequently we say that, upon petitioner's own evidence, a jury would be amply warranted in finding that petitioner had not exercised the highest degree of care, the utmost human foresight and diligence with respect to the safety of this signalling device, upon the proper operation of which depended the lives and safety of those whom it undertook to transport as passengers over its main line.

The authorities cited by petitioner in its supplemental brief in support of its theory of nonliability because one of its witnesses said that this was standard equipment, deserve but passing comment. In **Ozanne v. Illinois Central R. Co.**, 151 Fed. 900, it was held that the failure to equip a dressing room of a sleeping car with seats and handholds to prevent one from being thrown as the train passed around curves, did not constitute negligence per se. In **Adduci v. Boston El. Ry. Co.**, 15 Mass. 336, the plaintiff, alighting from an open street car, struck his foot on a wheel guard or sheath extending over a part of the running board, causing him to fall. It was held that negligence could not be predicated upon the use of such wheel guards. **Homestead Mine Co. v. Fullerton**, 69 Fed. 923, is

a master and servant case, having here no application whatsoever. Obviously, none of these cases are in point on the facts of the instant case.

## III.

Petitioner also contends in its supplemental brief that there was no evidence of negligence on the part of the employes of the Evansville road. Again, this matter is not one that ought to require any discussion, since, as we have shown in our brief in opposition to the petition for the writ, and shall undertake to further show herein, the petitioner is liable for any negligence of the employes of the Evansville road, it is quite obvious that, since plaintiff's case proceeded upon the res ipsa loquitur theory, the question of the negligence of the employes of the Evansville road was a matter for the jury. On the other hand, the facts hereinabove stated show, we submit, the very plainest sort of negligence on the part of the agents and servants of the Evansville road in respect to the operation of the switch and signal device on the occasion in question.

When Hughes, the conductor of the freight train of the Evansville road, telephoned to petitioner's train dispatcher at Preston for running orders east to Oakland and received such running orders he stepped out of the telephone booth and said to Carson, "All right," meaning for Carson to throw the switch to allow the freight train to proceed out eastwardly on petitioner's main-line track. And Car-

son immediately threw this switch. It appears from petitioner's evidence that what occurred was that, when the switch was thrown, the throw rod extending to the signal standard, being disconnected from the crank at the base thereof, did not turn the framework of the light standard so as to change the glass in front of the light from green to red. Carson said that when he threw the switch he examined the switch points and saw that they fitted up properly, but paid no attention to the light at all. Just then Hughes told him to walk up to the engine and ask the engineer if he thought they had time to make it to Oakland ahead of No. 2; Carson immediately walked to the engine, approximately about three car lengths, or about one hundred and twenty feet away, spoke to the engineer, and the engineer told him they had better not try it. **He thereupon immediately turned around and saw that the light at the switch was green.** He had just thrown this switch, opening it into the sidetrack. He knew that with the switch open the light should show red as a danger signal to the operators of trains on petitioner's main line. He knew that the conductor, Hughes, was waiting to go out onto the main line—had just received running orders over the main line and was waiting for Carson to tell him what the engineer had to say as to whether they could make it in time to Oakland. He walked back to about the switch point and told Hughes that the engineer said they had better not try it, and he and Hughes and Stanley, the other brakeman, then calmly

sat down near by and waited until the passenger train arrived, took the siding and plunged into the freight train. It could have taken Carson but a few seconds to walk from the switch point to the engine, and it appears from his testimony that he was surprised, upon turning around, to observe that the light was green. He says that he thought the conductor or the other brakeman must have closed the switch; but he knew that Hughes was waiting for his report from the engineer, and he did report to Hughes. It is entirely obvious that he failed to exercise even ordinary care and prudence, to say nothing of the very highest degree of care, in paying no further attention to this switch or signal light under such circumstances. Certainly, if he had exercised the slighest care he would have looked to see whether this switch was in fact closed, knowing, as he did, that the conductor could have had no object or purpose in closing the switch, or directing that it be closed, until he (Carson) had reported what the engineer had to say.

On direct examination Carson said:

> "Turned around, not thinking nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I turned around and seen the green switch, **never thought practically anything about it**, just thinking one or the other of them had lined it back; walked up there and sat down and never a one of us said a thing about the switch, and there we was." (Emphasis ours.)

And on cross-examination of this witness the following occurred:

"Q. But any other sort of examination while you were walking over, had you made it, would have determined the fact that it was open for the Southern?

A. Absolutely, but I just crossed over the track and walked up the other side of the track and sat down.

Q. You had plenty of time to look at the switch points, if you had wanted to?

A. I did."

He had just opened this switch. He knew that the passenger train was due, as he said, in a very short time. It was his imperative duty to close this switch. And it was the imperative duty of Hughes, who had ordered the switch to be opened, to see that it was closed. But neither of them gave a single glance at the switch or switch points. And Hughes says that when he stepped out of the telephone booth he, too, noticed the green light, **but paid no further attention to it.**

It was clearly Carson's duty, in the first place, when he threw this switch and opened it into the sidetrack, to see that the light target displayed a red light so as to properly warn traffic on the main line. This he did not do. **He admits that he threw the switch without paying the slightest attention to the light.** And added to this, when, a few seconds later, he turned around, and to his surprise saw that the light was green, whereas he expected to find

it red, he dismissed the matter from his mind altogether, without examination or inquiry of any sort whatsoever.

We respectfully submit that such conduct by no means measures up to that of ordinary care. And it is entirely clear that it constituted a failure on his part to exercise that very high degree of care required of him under the circumstances. We say that the negligence of the agents and servants of the Evansville Road plainly and boldly stands out from the evidence adduced by petitioner itself in an effort to carry the burden resting upon it and to exonerate itself from liability.

In this connection petitioner refers this Court to the case of **Gray v. Baltimore & Ohio R. R. Co.**, 24 Fed. (2d) 671, decided by the Circuit Court of Appeals for the Seventh Circuit. In that case the evidence showed that the switch light had been put out, the switch lock broken and the switch thrown by a negro who was subsequently convicted for the offense. The case is nowise here in point, however, for the reason that the plaintiff, by his pleading and proof, did not bring himself within the res ipsa loquitur rule. The Court (l. c. 673) said:

> "There is not in this case a general charge of negligence of the construction or maintenance of the railroad, or of any of the equipment or appliances. The first count is based upon the negligent operation of the locomotive. While the allegation is not specific as to the negligence, yet it is so far specific that it is limited to the handling of the locomotive. No reference

is made to the open switch. The second count is the special allegation that those in charge of the locomotive failed to see that the switch light was out and stop the train before it went into the open switch. The case was tried, and argued here, upon the theory that the engineer was negligent in not seeing that the light was out and in not stopping the train before he reached the switch."

"We are of opinion that the maxim, 'res ispa loquitur,' has no application in this case."

## IV.

Petitioner, in its brief in support of its petition for the writ, contends, however, that it is not responsible for the negligence of the agents and servants of the Evansville Company. In our original brief in opposition to the petition for the writ we undertook to briefly show that petitioner's contention in this regard is entirely without merit. We there pointed out that **this switch stand and signal device with which it was connected, and the mechanism employed therewith, constituted as much an integral part of petitioner's road and equipment as did its cars, rails or roadbed. It was an instrumentality of carriage.** The light standard or target, indeed, belonged to petitioner (Tr., p. 103), was on petitioner's own property, and was maintained, inspected and repaired by petitioner (Tr., pp. 121, 124). It was an instrumentality appurtenant to petitioner's main-line track, upon the proper operation of which depended the lives and safety of the passengers that petitioner undertook to carry over such line.

From the evidence adduced by petitioner it appears that petitioner permitted the employes of the Evansville Road, in operating the latter's trains over a portion of petitioner's main line, to operate this switch and signal device, without taking any precautions whatsoever to guard against the careless or improper operation thereof by such employes, and without taking any care whatsoever for the protection of its own passengers on its own main line, so far as concerns the signals given by this target. And petitioner's counsel appears to contend, in all seriousness, that petitioner could thus leave the operation of this instrumentality of carriage, on its own main line, to the employes of another company and thereby divest itself of all liability to its own passengers for the negligent operation thereof.

In the Court of Appeals, as well as in this Court, petitioner has placed reliance upon such cases as Arrowsmith v. Railroad, 57 Fed. 165; Moorshead v. United Railways Co., 119 Mo. App. 541, same case, 203 Mo. 121, and other cases of like character, involving the liability vel non of a lessor railroad company that leases its entire road and equipment to another company, surrendering all possession and control thereof, where such lease is authorized by legislative authority. The question whether a lessor company that has surrendered all possession and control of its entire roadbed, rolling stock and other equipment, under a lease sanctioned by legislative authority, remains liable for the negligence of the lessee in the operation of the road, is a matter that is here in nowise involved. There

is a conflict of authority on the subject, and with such contrariety of opinion we are not here concerned. **This is not a case in which it is sought to hold petitioner liable for the negligent operation of its road by a lessee to whom it has turned over full possession and control thereof.** In this case there was a **joint occupation and user** of a small portion of petitioner's main-line track by petitioner and the Evansville road, under a contract between the two roads whereby petitioner allowed the Evansville road to connect with its main line at Mine Junction and to run trains from that point eastwardly to Oakland, a distance of about ten miles, where there was another connection with the Evansville road. In our original brief in opposition to petitioner's petition for the writ we cited a list of cases holding that a railroad company is liable for injury to its own passengers occasioned through the negligence of another company jointly using its line or a portion thereof. The leading case is that of Illinois Central Railroad Co. v. Barron, 5 Wal. 90, 18 L. Ed. 590, which was discussed in our original brief; and the rule of law underlying the Barron case has been recognized and applied in many other cases, among them Denver & R. G. Ry. Co. v. Roller, 100 Fed. 738; Central Trust Co. of N. Y. v. Colorado-Midland Ry. Co., 97 Fed. 239, affirming 89 Fed. 560. And we there point out that **there is a very marked distinction between cases of the character just mentioned, involving the joint use and occupation of a line, or a portion thereof, by two railroad companies, and those in which**

it is sought to hold a lessor company liable where, by an authorized lease, it has leased its entire road and equipment to another company, surrendering all possession, control and right of operation thereof (1 Elliott on Railroads, 3d Edition, Sec. 551, p. 779).

But in the instant case the liability of petitioner for injuries to its own passengers, by reason of the negligence of the employes of the Evansville road in the operation and management of its switch and signal device, does not depend by any means upon the principle enunciated and applied in the Barron case and the other cases that have followed it. This for the reason that in the Barron case, supra, the Roller case, supra, the Colorado-Midland case, supra, and all of the other cases of that type, the defendant railroad company was held liable to its passengers for injuries occasioned by the negligent operation of trains by another company having running rights on its road; whereas, in the instant case, the collision which caused respondent's injuries was occasioned by the negligent operation of an instrumentality of carriage belonging to the carrier, appurtenant to its own main line, the operation and management of which had been entrusted to the agents and servants of another company, with no precautions whatsoever taken to see that such instrumentality was carefully and properly operated.

In other words—leaving out of consideration, for the moment, the fact that, in any event respondent made a case for the jury under the res ipsa loquitur rule—the

question is whether petitioner, Southern Railway Company, is liable to respondent **for injuries received by reason of the negligent and careless operation of its own signalling device, on its own main line, over which it was transporting respondent as a passenger.** Petitioner contends that, though this signal device was one of its own instrumentalities of carriage, a thing immediately and directly appurtenant to the proper and safe operation of its trains over its main line, it could, nevertheless, turn over the operation thereof to the employes of another company having the right to connect with its road and the right to the joint user of a portion of petitioner's road without becoming liable to its own passengers for injuries resulting from the negligent operation thereof.

**We respectfully point out that petitioner has not cited a single case in which any court has ever held that a railroad company may turn over the operation and management of any of its own instrumentalities of carriage to another road, jointly using some part of its road with it, and escape liability for injury to its own passengers by reason of the negligent operation or management of such instrumentalities of carriage.**

In its original brief petitioner refers to the case of **Stoddard v. Railroad,** 181 Mass. 422, in which it was said by Mr. Justice Holmes that the liability of a carrier to a passenger is based upon fault. The case does not in anywise support petitioner's contention, but, on the contrary,

refutes it. The nature of the case appears from the following syllabus, viz.:

> "A railroad company having contracted to transport the mails and the postal clerk in accordance with the United States postal regulations, is not liable for an injury to such clerk while remaining in the postal car which had been switched onto a sidetrack in a union depot at the termination of its journey, by reason of the negligence of the servants of another corporation in taking another car onto such track."

In the course of the opinion the Court said:

> "The contract of carriage is interpreted as applying to the **instrumentalities of carriage** even when belonging to others, so far as to make a carrier answerable for their negligence. * * *" (Emphasis ours.)

The Stoddard case is consequently pointed authority in support of respondent's contention that the petitioner, Southern Railway Company, is liable to respondent for injuries sustained by him in a collision resulting from the negligent operation or management of one of petitioner's own **instrumentalities of carriage**, on petitioner's main line, over which petitioner was transporting respondent at the time; that petitioner would be liable for the negligent operation of such **instrumentality of carriage** whether it belonged to petitioner or to another, and whether petitioner undertook to operate it through its own employes or left the operation thereof to the employes of

another carrier jointly using a portion of its road. In other words, as said in the Stoddard case, the contract of carriage between the petitioner and this respondent is interpreted as applying to such instrumentalities of carriage. And it cannot be gainsaid that a switch and signal device such as that here in question is as much an instrumentality of carriage as the cars, rails or roadbed of the carrier.

V.

In this connection it is contended by petitioner that under the Indiana statutes pleaded in its answer petitioner was bound to permit the Evansville Company to connect with its road at Mine Junction, and that therefore petitioner cannot be held liable for the negligence of the employes of the Evansville road with respect to the operation of this switch and signal device. But this is obviously a non sequitur. Assuming, arguendo, that these statutes required petitioner to permit the Evansville road to make such use of its tracks, it is entirely clear that petitioner was not thereby either required or authorized to turn over to the Evansville road the operation of its own switch and signaling devices on its main line, without taking any precaution to see that they were carefully and properly operated and thus escape liability to its own passengers for the negligent operation thereof.

Referring to these statutes, we desire to again point out, as we did in our original brief, that Sections 12808, 13106

and 13079 of Burns' Indiana Statutes 1926, which are set out on pages 45, 46 and 47 of petitioner's original brief in support of its petition for the writ of certiorari, **were not pleaded** in petitioner's answer below, and were not, of course, offered in evidence and are not in this case. The sections of the Indiana statute pleaded are Sections 12931, 13206, 13207 and 13208 of Burns' Annotated Statutes 1926. These statutes, upon their face, apply to railroad companies **incorporated under the laws of the State of Indiana**; whereas the record affirmatively shows that **petitioner is a corporation existing under and by virtue of the laws of the State of Virginia.** (See petition for removal, Tr., p. 8.) But, if we assume that these statutes have any application, it is entirely clear, we submit, that they do not in anywise affect the question of petitioner's liability to respondent for injuries received by the latter while a passenger upon petitioner's train caused by the negligent management or operation of one of petitioner's own **instrumentalities of carriage**, namely, a switch and signal device, on its own main-line track. It is unnecessary to set out these statutes here at length. They appear on pages 13 and 14 of petitioner's transcript of the record. The sixth subdivision of section 12931, supra, purports to give to a railroad company incorporated under the laws of Indiana the right to cross and unite its railroad with any other railroad before constructed at any point on its route, etc.

Section 13206, supra, provides as follows:

> "All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said railroad companies may agree."

Section 13207, supra, purports to ratify all contracts of the character mentioned in section 13206 which had been theretofore made in good faith between railroad companies organized under the laws of Indiana.

Section 13208 provides as follows:

> "Every railroad that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

While section 12931 permits a domestic railroad company to unite its road with that of another, and section 13206 authorizes domestic companies to enter into contracts with other companies for the joint user of the tracks

and roads of such companies, **it is entirely obvious that these sections do not in any way purport to relieve a railroad company from liability to its own passengers for injuries received through the negligent operation or management of any of its own instrumentalities of carriage,** no matter how many lines may make connections with its road or may have a joint right of user thereof.

And section 13208, supra, simply provides that a railroad running and operating its trains over the road of another company shall be liable to third persons for the negligent operation thereof as though it owned the road over which it is operated.

In other words, there is nothing to be found in these Indiana statutes that may by any possibility be construed as attempting to relieve petitioner from liability to its own passengers for injuries received by reason of the negligent operation of its own instrumentalities of carriage. **Asssuming that the Indiana statutes required petitioner to allow the Evansville road to connect with and jointly use a portion of its line, it is entirely clear that such statutes do not in any way purport to authorize petitioner to surrender to any such other road the operation and management of its own instrumentalities of carriage and thus relieve itself of liability to its own passengers.**

In this connection petitioner, in its original brief in support of its petition for the writ, cites and quotes from the case of **New York, N. H. & H. R. Co. v. Baker,** 98 Fed. 694, in support of petitioner's argument that petitioner

was bound under the Indiana statutes to allow the Evansville road a connection at Mine Junction and the right of joint user of a part of petitioner's road, and that, therefore, petitioner is not liable for any negligence of the employes of the Evansville company in operating petitioner's own switch and signal device, constituted an instrumentality of carriage appurtenant to its own main line over which it was transporting respondent as a passenger. The Baker case, we respectfully say, affords no support whatsoever for this contention.

In the Baker case plaintiff's wife was injured while a passenger on one of defendant's trains which was being operated from Mt. Vernon to Grand Central Depot in New York City, and was injured by reason of the swinging of the boom of a derrick which was being operated near the track, causing a portion of the tackle to strike one of the windows of the car in which plaintiff's wife was riding. The Legislature of New York, having determined to raise the grade of the railroad bridge at Harlem River and the approaches thereto, provided for such changes to be made by legislative act. The Legislature took the work entirely out of the hands of the railroad company and provided and directed that the work should be done by an independent board which was created for that purpose, in the creation of which the defendant railroad company had no voice and over whose employes it had no control. The railroad company had no control over the work and no means whatsoever of supervising the same. It was in such

a situation that the Court observed that through the cases referred to in the opinion ran the idea of choice—the power to act or refrain from acting. The Court said that the railroad had no choice left to it; that the state intervened and directed that the work be done by this independent board, with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent; that consequently, the railroad company was not liable for the negligence of the employes of the board in respect to the operation of this derrick.

**It will be observed that there is a wide distinction between the Baker case and the case at bar.**

First. In the Baker case, unlike the present case, there was no joint user of tracks or other instrumentalities of carriage.

Second. In the Baker case, the statute commanded the work be done by a board over which defendant railroad had no control, or even the slightest supervision. The Court in the Baker case said (l. c. 696):

> "As to so much, however, as lay south of the Harlem River, which included the location of the accident, it took the work entirely out of the hands of the railroad company confiding the execution, direction and superintendence of the work to a board, * * *."

In the present case the Indiana statute makes no provision nor reference whatsoever as to how the connection

or the switch and signal devices shall be maintained or operated and controlled. Indeed, as a matter of fact, and as shown by petitioner's own evidence, the petitioner in the present case exercised **control** and **superintendence** in the following respects:

(a) Petitioner itself inspected and repaired the switch, light standard, etc., from time to time.

(b) The petitioner's equipment, i. e., switch, light standard, etc., was used.

(c) The E. I. & T. H. trainmen and other employes were under the direct supervision and orders of the petitioner's dispatcher and could move only upon his order and permission.

In the instant case respondent, while a passenger upon petitioner's train, operated on its main line, was injured because of the negligent operation or management of one of petitioner's own instrumentalities of carriage on such main line, the operation of which petitioner was not, by statute or otherwise, required to turn over to the employes of another road, or to any board or other independent agency.

As said in the Stoddard case, supra (181 Mass. 422), **petitioner's contract of carriage with respondent is to be interpreted as applying to every instrumentality of carriage appurtenant to the line over which petitioner was carrying respondent as a passenger.** And it matters not whether petitioner was actually in control of and operating

this switch and signal device through its own employes, or whether it left the operation and management thereof to the employes of another company; it remained liable, in any event, to its own passengers for any negligence in the operation thereof.

Nowhere in the Indiana statutes pleaded is there any intimation that a railroad company whose road is intersected by or to any extent used by another company may be permitted to surrender to such other company the operation and management of its own instrumentalities of carriage and thereby escape liability to its own passengers for the negligent operation and management thereof. Indeed, there is nothing in any of these Indiana statutes that in anywise purports to prevent this petitioner from exercising full and complete authority and supervision over its switch and signal devices at such connecting points appurtenant to its own main-line track, constituting essential and integral parts of its system—instrumentalities of carriage essential to the operation of its own trains. Petitioner had the full, unlimited right and authority to supervise and control the operation and management of the signal device here in question. This it did not do, but simply left it to the crew of this freight train to see that the switch was closed and that this signal device was working properly. This crew, employes of the Evansville Company, negligently opened this switch and left it open for twenty or twenty-five minutes, with the signal light showing green, showing a clear track to the engineer of petitioner's train,

while they calmly sat down a few feet away and waited for the passenger train to take the siding and plunge into the freight train.

In closing, we again refer to the case of McElroy v. Railroad, 4 Cush. (Mass.) 400, where the casualty occurred by reason of the negligent operation of a switch, which, under an arrangement between the defendant and another road, was provided for and attended by a servant of the latter company at its expense. The Court, in part, said:

> "The switch in question, in the careless or negligent management of which the damage occurred, was a part of the defendant's road, over which they must necessarily carry all their passengers, and although provided for and attended by a servant of the Concord Railroad Corporation, and at their expense, yet it was still a part of the Nashua and Lowell Railroad, **and it was within the scope of their duty to see that the switch was rightly constructed, attended and managed before they were justified in carrying passengers over it.**" (Emphasis ours.)

For the reasons shown above, respondent prays that the writ of certiorari heretofore issued herein be quashed.

Respectfully submitted,

JESSE W. BARRETT,
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MARK D. EAGLETON,
WILLIAM H. ALLEN,
Counsel for Respondent.

# SUPREME COURT OF THE UNITED STATES.

No. 342.—October Term, 1930.

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| Southern Railway Company, tioner, *vs.* Jack W. Hussey. | Peti- | On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. |

[April 13, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover for personal injuries suffered by the plaintiff, the respondent here, a passenger upon a train of the petitioner and on the petitioner's road, in consequence of a collision with a train of the Evansville, Indianapolis and Terre Haute Railway Company, a corporation of Indiana. The petitioner to meet the plaintiff's *prima facie* case, relied upon the following facts. The collision happened in Indiana on September 2, 1927. A statute of that State authorized Indiana railroads to cross and unite with any other railroad before constructed and required the intersected road to unite with the new one in forming such intersections and connections and to grant specified facilities. 3 Burns, Annotated Statutes, 1926, § 12931. Other sections authorized and ratified contracts for running trains of one road over the tracks of another, and made the railroad so running its trains over the tracks of another liable to the same extent as if it owned the tracks.

In January, 1922, the petitioner made a contract with the Evansville road providing for a connection with the petitioner's line to enable the Evansville Company to carry coal from mines near Francisco, where the lines connected, to Oakland City, a distance of about seven miles. The Evansville Company was to reimburse the petitioner for the 150-foot connection and was to maintain it at its own cost in all respects in accordance with the requirements of the petitioner. The petitioner was to have control of operations on this section of their main track, to provide for the movement of the Evansville trains over the section, and to furnish the necessary

operators, signal men, &c. The Evansville crews and employees while in the section were to be governed by the petitioner's rules and amenable to orders of the petitioner's superintendent. We think it unnecessary to quote further in order to show the relation in which the petitioner stood to this portion of its own road. This contract was offered in evidence by the defendant but was excluded subject to its exception. It is before us in the record, but as it does not change the petitioner's liability in this case it does not matter whether it is let in our kept out. See *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 5.

The two roads are connected of course by a switch. The lever by which the switch was opened and shut was connected with a signal device so arranged that when the switch was closed and it was safe to go ahead on the main line a green light was shown. If the switch was open a red light meant stop. Just before the collision an Evansville train was waiting on the sidetrack to go to Oakland City. The switch had been opened in expectation of going on, but the conductor, learning that there was not time before the probable arrival of a Southern train, ordered it to be closed. A man started to do it but seeing the green light displayed supposed that it had been closed already and did nothing. In fact, owing to a defect in the switch, the green light had failed to give way to the red as it should have done, and when the Southern train arrived its engineer was led to think that the way over the main track was clear. The train went ahead but was turned on to the sidetrack and ran into the waiting Evansville train, causing disaster and death.

The Court instructed the jury that if the plaintiff was injured as a direct result of the negligence of either company or of both they should find for the plaintiff. There was a verdict and judgment for the plaintiff and the judgment was affirmed by the Circuit Court of Appeals. 42 F. (2d) 70. A writ of certiorari was granted by this Court.

The petitioner states the question as being whether it is liable for an injury to a passenger caused by the negligence of the employees of the other company in failing to close the switch that connected the two roads, which was installed, owned and operated exclusively by and for the benefit of the Evansville Company; was so constructed, maintained and operated under the compulsion

of a statute of Indiana, and was so constructed and operated under a contract expressly authorized by the statutes of Indiana. But this statement needs a good deal of qualification. It is doubtful whether the statute in the word 'unite' contemplates more than intersection. It certainly did not require the contract that the petitioner made. The terms of that contract were of the petitioner's own choosing and they gave the paramount authority to the Southern road. As was to be expected the main track remained its own and subject to its control. There is no dispute that the collision was caused by an interruption of the course of the main line through the misplacement of a switch in consequence of a defect in the signal. The Southern road had not abdicated its control over its main line or its ultimate authority over the switch. If, as the jury must have found under the instructions, the defect in the light was not due to a sudden inevitable accident but could have been avoided by care, the Southern road owed that care to the plaintiff, and therefore whether the men immediately in contact with the switch were employees of the Evansville or the Southern Company the Southern was responsible for this condition to the passengers in its train. *Illinois Central R. R. Co.* v. *Barron*, 5 Wall. 90. *McElroy* v. *Nashua & Lowell R. R. Corp.*, 4 Cush. 400. This case is not of the class concerning the liability of a lessor for injuries immediately attributable to the lessee, but concerns a responsibility for the condition of its road from which the petitioner did not divest itself, even if it could.

*Judgment affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*